

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Policies)	

**SECOND REPORT AND ORDER AND THIRD
NOTICE OF PROPOSED RULE MAKING**

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By the Commission: Chairman Powell, Commissioners Abernathy, Copps, and Martin issuing separate statements.

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I. INTRODUCTION

1. In this *Second Report and Order and Third Notice of Proposed Rule Making*, we adopt a new broadcast equal employment opportunity (“EEO”) Rule in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (“*Association*”). In addition, we amend our EEO rules and policies applicable to cable operators, and other multichannel video programming distributors (“MVPDs”), to conform them, as much as possible, to the broadcast EEO Rule.¹ The new broadcast EEO Rule and modified EEO rules for MVPDs, adopted herein, emphasize outreach in recruitment to all qualified job candidates and ban discrimination on the basis of race, color, religion, national origin or gender. We are also issuing a *Third Notice of Proposed Rule Making* requesting comment as to the applicability of our rules with respect to part-time employees.

II. BACKGROUND

2. We have administered regulations governing the EEO responsibilities of broadcast licensees since 1969,² and of cable television operators since 1972.³ Our responsibilities in this area were codified with respect to cable television operators in 1984.⁴ They were further codified with respect to television broadcast licensees and extended to other MVPDs in 1992.⁵ In 1998, however, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission’s EEO program requirements for broadcasters were unconstitutional in *Lutheran Church-Missouri Synod v. FCC*.⁶

3. In *Lutheran Church*, the court focused on the Commission’s “processing guidelines disclosing the criteria it used to select stations for in-depth EEO review when their licenses came up for

¹ Our MVPD EEO rules, 47 C.F.R. § 76.71, *et seq.*, were implemented pursuant to Section 634 of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), that applied to cable operators, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), that extended the rules to other MVPDs. *See also* 47 C.F.R. §§ 21.920, 25.601, 74.996, 76.1702, 76.1802, and 100.51. Our rules define “multichannel video programming distributor” as “an entity such as, but not limited to, a cable operator, a multipoint distribution service, a multichannel multipoint distribution service [“MMDS”], a direct broadcast satellite service [“DBS”], a television receive-only satellite program distributor, and a video dialtone program service provider...” 47 C.F.R. § 76.71(a). For purposes of the EEO requirements, Congress defined the term “cable operator” as including multichannel video programming distributors that control the programming they distribute. 47 U.S.C. § 554(h)(1); 47 C.F.R. § 76.71(a). Given that our rules define MVPDs as including cable operators, for ease of reference we use the term MVPDs throughout this *Second Report and Order* to include both cable operators and other MVPDs. We will not apply any EEO program requirements to low power FM stations because the vast majority of this class of licensees will employ few (if any) full time, paid employees.

² *See Nondiscrimination in Employment Practices*, 18 F.C.C. 2d 240 (1969).

³ *See Report and Order*, 34 F.C.C. 2d 186 (1972).

⁴ *See Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

⁵ *See Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992).

⁶ 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh’g denied*, 154 F.3d 487, *pet. for reh’g en banc denied*, 154 F.3d 494 (D.C. 1998) (“*Lutheran Church*”).

renewal.”⁷ The court concluded that because “[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit,” the processing guideline “induces an employer to hire with an eye toward meeting the numerical target.”⁸ The Court thus concluded that the EEO program requirements were unconstitutional because they “pressure – even if they do not explicitly direct or require – stations to make race-based hiring decisions.”⁹ The Court made clear that “[i]f the regulations merely required stations to implement racially neutral recruiting and hiring programs, the equal protection guarantee would not be implicated.”¹⁰ And it reiterated in response to the government’s rehearing petition that it had not held that a regulation “encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny.”¹¹

4. In 1998, we issued a *Notice of Proposed Rule Making*¹² for the purpose of adopting EEO rules for broadcast licensees and MVPDs consistent with the Court’s decision in *Lutheran Church*. In 2000, we adopted new EEO program requirements for broadcasters.¹³ Substantially the same program requirements were applied to MVPDs. The Commission explained that the new rules required more “than merely refraining from discrimination.” They also required broadcasters and MVPDs “to reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities [because] ... repeated hiring without broad outreach may unfairly exclude minority and women job candidates” The Commission concluded that nondiscrimination in hiring was not enough when not all potential applicants have had a fair opportunity to apply. “Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.”¹⁴

5. The new rule contained two primary requirements – a prohibition on discrimination based on race, color, religion, national origin or gender in hiring, and a requirement that broadcasters reach out in recruiting new employees to ensure that all qualified individuals had an opportunity to apply for and be considered as job candidates. The core of the recruitment requirement was that broadcasters widely disseminate information concerning all job vacancies. The Commission concluded that this basic requirement “is essential to meaningful outreach.”¹⁵ The Commission left it largely to broadcasters’ discretion concerning how they would fulfill this requirement, so long as their procedures were sufficient to ensure wide dissemination of information about all job openings to the entire community.

6. In addition to the basic requirement of wide dissemination of information concerning job openings, the new rule provided broadcast licensees with two recruitment options. Under “Option A,”

⁷ 141 F.3d at 352.

⁸ 141 F.3d at 353, 354.

⁹ 154 F.3d at 491.

¹⁰ 141 F.3d at 351.

¹¹ 154 F.3d at 492.

¹² 13 FCC Rcd 23004 (1998) (*1998 NPRM*).

¹³ 15 FCC Rcd 2329 (2000) (“*Report and Order*”), *recon. denied*, 15 FCC Rcd 22548 (2000) (“*Recon*”).

¹⁴ *Report and Order*, ¶ 3, 15 FCC Rcd at 2331.

¹⁵ *Report and Order*, ¶ 85, 15 FCC Rcd at 2368.

they were required to undertake two types of supplemental recruitment measures. The first measure required licensees to provide notification of job vacancies to any recruitment organization that requested such notice from the broadcaster.¹⁶ The second supplemental measure under Option A required broadcasters to participate in additional recruitment activities beyond the traditional recruitment that occurs with individual vacancies. These additional measures were to be selected from an open-ended menu of types of activities that included: job fairs, job banks, scholarship programs, and community events related to employment opportunities in the industry, among others.¹⁷ Broadcasters were permitted to comply with the supplemental requirement by participating in activities other than the listed ones so long as they were designed to disseminate information about employment opportunities to candidates who might otherwise not learn of them.¹⁸ Broadcasters who selected Option A were required to maintain, but not routinely submit to the Commission, records documenting their compliance with the wide dissemination and supplemental recruitment requirements. They were not required to maintain any data on the race, ethnicity or gender of applicants, interviewees or individuals they hired.¹⁹

7. In response to commenters who urged the Commission to provide greater recruiting flexibility, the Commission adopted an “Option B” for recruitment that permitted licensees to forego the supplemental recruitment measures required under Option A “and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, *i.e.*, that it widely disseminates job vacancies throughout the local community.”²⁰ A broadcaster who chose this option and designed its own recruitment program was required to track the recruitment sources, gender, and race/ethnicity of its applicant pools so that the broadcaster, the public and the Commission could evaluate the effectiveness of the program.”²¹ The Commission emphasized that “there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force,” but that “few or no females or minorities in a broadcaster’s applicant pools may be one indication (and only one indication) that the station’s outreach efforts are not reaching the entire community.”²²

8. In *Association*, the court rejected statutory challenges to the new EEO rule and held that the rule was not arbitrary and capricious. It found, first, that the contention that the rule relied on the goal of promoting programming diversity – the legitimacy of which had been questioned in *Lutheran Church* – was “beside the point” because the Commission had made clear “that its primary and assertedly sufficient goal in issuing the EEO rule was to prevent invidious discrimination.”²³ It found nothing arbitrary or capricious in the Commission’s pursuit of that goal. Second, the court found unsupported the claim that,

¹⁶ *Report and Order*, ¶¶ 95-98, 15 FCC Rcd at 2371-72.

¹⁷ *Report and Order*, ¶¶ 99-103, 15 FCC Rcd at 2372-74.

¹⁸ *Report and Order*, ¶ 102, 15 FCC Rcd at 2373.

¹⁹ *Report and Order*, ¶¶ 111-13, 116-18, 15 FCC Rcd at 2376-78.

²⁰ *Report and Order*, ¶ 104, 15 FCC Rcd at 2374.

²¹ *Id.*

²² *Report and Order*, ¶ 120, 15 FCC Rcd at 2378.

²³ 236 F.3d at 18.

because the new rule allegedly increased the regulatory burden imposed on stations, it was arbitrary and capricious.²⁴

9. The court held, however, that Option B of the rule was subject to strict scrutiny because those broadcasters who elected Option B were required to report the race and sex of each job applicant. The court reasoned that this requirement would pressure broadcasters to focus their recruitment efforts on minorities and women because the FCC might investigate them if their recruitment efforts attracted few or no minorities or women. The court concluded that the EEO rule could not withstand strict scrutiny because, even if there were a compelling government interest in preventing discrimination – an issue the court did not resolve – the rule was not narrowly tailored to further that interest.²⁵ Therefore, it held that Option B was unconstitutional under the equal protection component of the Due Process Clause of the Fifth Amendment.²⁶

10. The court found no constitutional defect in recruitment Option A of the EEO rule. Since Option A did not require broadcasters to report the race or sex of job applicants or interviewees, and allowed them to select supplemental recruitment measures that do not “place special emphasis upon the presence of women and minorities in the target audience,” it held that broadcasters were not “meaningfully pressured under Option A to recruit women and minorities.”²⁷ Although the court found only Option B unconstitutional, it held that Option B could not be severed from the rest of the EEO rule. Accordingly, the court vacated the entire rule.

11. The Commission filed for hearing and rehearing *en banc*, arguing that Option B was not essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees and that it had made plain its intent that Option B be severable. The court denied rehearing.²⁸ However, it noted that the Commission was free, in a new rulemaking proceeding, to adopt other EEO measures that would “accommodate the concerns [the Commission] expressed about broadcasters' need for flexibility in general and about the burden Option A would impose upon broadcasters in small markets in particular” or to “change its goals.”²⁹

12. We issued the *Second Notice of Proposed Rulemaking* (“*Second NPRM*”)³⁰ to request public comment on the adoption of new broadcast and MVPD EEO rules consistent with *Association*. An

²⁴ *Id.*

²⁵ *Id.* at 21-22.

²⁶ *Id.* at 22.

²⁷ *Id.* at 19.

²⁸ 253 F.3d 732.

²⁹ *Id.* at 736. As a result of the Court’s decision, the Commission suspended the portions of its broadcast and MVPD EEO rules concerning EEO outreach program requirements and the reporting requirements until further order of the Commission. *Suspension of the Broadcast and Cable Equal Employment Outreach Program Requirements*, 16 FCC Rcd 2872 (2001). The rules prohibiting discrimination in broadcast and MVPD employment were not suspended.

³⁰ 16 FCC Rcd 22843 (2001).

En Banc open hearing on the proposed rules was held before the full Commission on June 24, 2002. Having reviewed the suggestions contained in the comments submitted,³¹ both in writing and at the *En Banc* hearing, we are adopting new EEO rules that consist primarily of the elements of our former rules that the Court upheld as constitutional in *Association*, with modifications.

III. SUMMARY

13. In this order, we adopt new outreach requirements applicable to broadcast and MVPDs. We are also retaining the nondiscrimination rules applicable to broadcasters and MVPDs.

14. The following is a summary of the three-pronged outreach requirement we are adopting as it relates to broadcasters:

- Prong 1: widely disseminate information concerning each full-time (30 hours or more) job vacancy, except for vacancies filled in exigent circumstances;
- Prong 2: provide notice of each full-time job vacancy to recruitment organizations that have requested such notice; and
- Prong 3: complete two (for broadcast employment units with five to ten full-time employees or that are located in smaller markets) or four (for employment units with more than ten full-time employees located in larger markets) longer-term recruitment initiatives within a two-year period.

The following is a summary of recordkeeping and reporting requirements:

- (a) collect, but not routinely submit to the Commission: (i) listings of all full-time job vacancies filled by the station employment unit, identified by job title; (ii) for each such vacancy, the recruitment sources used to fill the vacancy (including, if applicable, organizations entitled to notification, which should be separately identified), identified by name, address, contact person and telephone number; (iii) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies; and (iv) documentation necessary to demonstrate performance of the Prong 3 menu options, *e.g.*, job fairs, mentoring programs; (v) the total number of interviewees for each vacancy and the referral source for each interviewee; and (vi) the date each job was filled and the recruitment source that referred the hiree.
- (b) place in the station public file annually a report including the following: (i) a list of all full-time vacancies filled during the preceding year, identified by job title; (ii) recruitment source(s) used to fill those vacancies (including organizations entitled to notification of vacancies pursuant to Prong 2), including the address, contact person, and telephone number of each source; (iii) a list of the recruitment sources that referred the people hired for each full-time vacancy; (iv) data reflecting the total number of persons

³¹ Some comments were submitted after the April 15, 2002, deadline. We are accepting all of those comments in order to have the fullest possible record to inform our decision.

interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source; and (v) a list and brief description of Prong 3 menu options implemented during the preceding year.

- (c) submit the station's EEO public file report to the Commission as part of the renewal application and midway through the license term for the Commission's mid-term review for those stations subject to mid-term review (television stations with five or more full-time employees and radio stations with more than ten full-time employees). EEO public file reports for the preceding two year period will be required because broadcasters have two years in which to complete the prong 3 menu options. Broadcasters must also post the current EEO public file report on their web site, if they have one.

15. The same requirements will apply to MVPDs, except as necessary to comply with different statutory requirements. For example, Section 634 of the Communications Act of 1934, as amended ("Communications Act")³² requires that MVPDs file reports on an annual basis containing information specified in the statute. The Commission is also required to certify that MVPD employment units are in compliance with the EEO requirements on an annual basis.³³ Accordingly, to comply with the Prong 3 requirements, MVPD employment units with six to ten full-time employees and employment units located in smaller markets will be required to undertake one recruitment initiative each year and larger employment units located in larger markets two recruitment initiatives per year. MVPD employment units are not subject to a renewal process at the Commission. Pursuant to Section 634(e)(2) of the Communications Act, however, the Commission is required to conduct a more thorough review of each cable employment unit's EEO compliance every five years. Hence, MVPDs with six or more full-time employees will submit a copy of their most recent EEO public inspection file report to the Commission every five years.

16. The Commission has implemented the MVPD annual reporting requirement under Section 634 by FCC Forms 395-A (cable operators) and 395-M (other MVPDs). We will create a new Form 396-C for all MVPDs that will encompass the same information concerning the unit's EEO outreach efforts that was formerly required in FCC Forms 395-A and 395-M. The prior forms were also used to collect data concerning the race/ethnicity and gender of the unit's workforce. The form we are adopting today will not encompass such data because, as indicated below, we will defer action on the collection of workforce data.

17. We are not acting at this time on issues raised in the *Second NPRM* concerning the broadcast annual employment report (FCC Form 395-B), which has in the past been used to collect data concerning the workforces of broadcast employment units, including data concerning the race/ethnicity and gender of those workforces. We are similarly not acting on a comparable form for MVPDs. The Office of Management and Budget ("OMB") adopted new standards for classifying data on race and ethnicity in 1997 that must be incorporated in any such forms beginning in 2003.³⁴ We must incorporate

³² 47 U.S.C. § 554.

³³ See Section 634(e)(1) of the Communications Act.

³⁴ *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (1997).

these new standards in our future forms.³⁵ In addition, a party has raised issues concerning the collection and processing of the forms.³⁶ Because the employment reports are filed on September 30 of each year, the next reports would not be due earlier than September 30, 2003. We expect the forms to be completed by this deadline. Accordingly, there is no urgency in resolving issues relating to the data collection. Conversely, there is no need to delay adopting new EEO rules. The data collected in the employment reports will be used only to compile trend reports and report to Congress.³⁷ It will not be used to determine compliance with the EEO rules that we adopt today.³⁸ Accordingly, we will defer action on issues relating to the broadcast and MVPD workforce data collection requirements and address them in a future report and order.

IV. DISCUSSION

A. Statutory Authority for EEO Program Requirements and Anti-Discrimination Rules

1. EEO Rules Applicable to Multichannel Video Programming Distributors

18. The Commission is explicitly authorized by Section 634 of the Communications Act to adopt and enforce the MVPD EEO rules.³⁹ Indeed, Section 634 requires us to enforce EEO rules for MVPDs. The court did not address the validity of our MVPD EEO rules in either the *Lutheran Church* or *Association* decisions. Nevertheless, because certain provisions in the MVPD EEO rules are similar to those provisions in the broadcast EEO Rule found to be unconstitutional in *Association*, we are revising our MVPD EEO rules so that they comply with the court's decision.

19. Although the Commission is required by Section 634 to enforce EEO Rules for the MVPD industry, Congress built into Section 634 flexibility by allowing the Commission to implement MVPD EEO rules by rulemaking rather than simply prescribing MVPD EEO requirements by statute; by stating in Section 634(d)(2) that the "rules shall specify the terms under which" an entity shall take the actions specified in that section;⁴⁰ and by providing in Section 634(d)(4) that the Commission may amend the MVPD EEO rules "from time to time to the extent necessary to carry out the provisions of this section." Our rulemaking authority, particularly under Sections 634(d)(2) and 634(d)(4), permits us to adopt new, race-neutral outreach requirements and to revise the FCC Forms filed by MVPDs to make them consistent with our modified broadcast EEO rules. None of the commenting parties disputes that Section 634 explicitly authorizes the Commission to adopt and modify our MVPD EEO regulations to

³⁵ 3060-0390 OMB Notice of Action dated February 24, 2000 from OMB to FCC.

³⁶ See *ex parte* letter dated October 28, 2002, from StBAs to FCC ("If the Commission believes...that it must conduct annual surveys of industry employment trends, it must do so by having a reputable, third party act as a clearing house for the aggregation of such data on an anonymous, non-attributable basis.").

³⁷ *Second NPRM*, ¶ 50, 16 FCC Rcd at 22858.

³⁸ We thus find no merit in StBAs' argument that resolution of [the 395-B] issues is "inextricably intertwined" with the issues addressed in this *Second Report and Order*. See *ex parte* letter dated October 28, 2002, from StBAs to FCC.

³⁹ 47 U.S.C. § 554.

⁴⁰ In contrast, Section 634(c) simply provides that MVPDs "shall" comply with five listed requirements in implementing their EEO programs.

advance congressional goals identified in the statute, and two parties filed comments agreeing that we have such statutory authority.⁴¹

20. Additionally, Section 634(d)(2) obligates the Commission to implement the listed requirements only “to the extent possible,” consistent with other conflicting requirements or limitations. The court’s decision in *Association* delineates constitutional limitations with which we must reconcile the MVPD EEO rules. We believe that Section 634(d)(2) permits the Commission to eliminate those provisions of the MVPD EEO rules that are similar to those struck down by the court in *Association* because it is not “possible” for the Commission to enforce a provision that a court has found unconstitutional. Accordingly, we modify the MVPD EEO rules in this *Second Report and Order and Third Notice of Proposed Rule Making* to remove provisions similar to those found unconstitutional in *Association*. We also revise the forms filed by MVPDs to conform them with our modified rules.

2. EEO Rules Applicable to Broadcasters

21. The Commission has ample statutory authority to retain its EEO anti-discrimination rule and, consistent with the constitutional standards established in *Lutheran Church* and *Association*, to promulgate new EEO outreach requirements for broadcasters. Congress explicitly authorized the Commission in 1992 to regulate the EEO practices of television broadcasters and has ratified the Commission’s authority to adopt EEO rules for all broadcasters.

a. Section 334: Explicit Authority to Regulate EEO Practices of Television Broadcasters

22. In 1992, Congress enacted Section 334 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992.⁴² Section 334 provides that “the Commission shall not revise:”

(1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees; or

(2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.⁴³

23. The Conference Report accompanying this legislation indicates that Section 334 “codifies the Commission’s equal employment opportunity rules, 47 C.F.R. 73.2080” for television licensees and permittees.⁴⁴ Section 334 thus grants the Commission explicit authority to regulate the EEO practices of

⁴¹ NOW Reply Comments at 7; American Cable Association Reply Comments at 5.

⁴² Pub. L. No. 192-385, 106 Stat. 1460 (“1992 Cable Act”).

⁴³ 47 U.S.C. § 334(a).

⁴⁴ Conf. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992). The Senate bill, S.12, contained no EEO provisions. Section 334, as adopted by the conference committee, was derived from the House amendment of S.12, which contained (1) provisions strengthening the cable EEO requirements and (2) provisions (modeled after Section 634 of the Communications Act) that codified and strengthened the Commission’s existing broadcast EEO rules as applied to broadcast television stations entitled to cable carriage under the 1992 Cable Act. The conference committee adopted the House provisions applicable to cable entities. But instead of adopting the House provisions

television broadcasters. Section 334 was enacted as part of Section 22 of the 1992 Cable Act, which sets forth Congressional findings that, despite existing FCC EEO rules, there were few women and minorities in managerial positions in the MVPD and broadcast industries; that increased employment of women and minorities in managerial positions will advance the national policy favoring diversity of viewpoints in the electronic media; and that rigorous enforcement of EEO rules is required to effectively deter racial and gender discrimination.⁴⁵

24. LTVG and Golden Orange argue that because Section 334 is written in negative terms, it does not authorize the Commission to adopt new outreach rules that are quite different from the 1992 EEO rules which the court invalidated in the *Lutheran Church* decision.⁴⁶ Further, these commenters argue that Section 334 prohibits the Commission from adopting new outreach rules because those rules represent substantive “revisions” of the 1992 rules.⁴⁷ Golden Orange asserts that Section 334 is still in effect because the court did not hold that statutory provision unconstitutional and that the Commission cannot disregard it.

25. We agree that Section 334 of the Act was not invalidated by the court in either the *Lutheran Church* or *Association* cases, and thus remains in effect. We disagree, however, on the current effect of that statutory provision. Section 334 prohibited the Commission from revising the 1992 EEO rules and the Commission did not do so. The court *invalidated* the EEO program requirements in effect in 1992 on constitutional grounds. To the extent that the court held the 1992 EEO rules unconstitutional and invalidated those rules in *Lutheran Church*, those rules are no longer in effect and the Commission cannot enforce them against television broadcasters notwithstanding Section 334. Section 334 does *not* prohibit the Commission, however, from adopting *new* rules to fill the void left by the court’s decision.

26. Golden Orange asserts that the Commission is “not free to pick and choose those portions of the Act which it will obey.”⁴⁸ Although this is of course true, the Commission is not choosing to obey only selected portions of the Act. After the *Lutheran Church* decision, the Commission is required by Section 334 to enforce against television broadcasters only those portions of the 1992 EEO rules that the court did not invalidate. The court held that “the Commission’s EEO program requirements are unconstitutional” and invalidated those rules,⁴⁹ but did not invalidate the nondiscrimination requirement in Section 73.2080(a) of the rules.⁵⁰ Rather, it remanded the case to the Commission to determine

for must-carry broadcast stations, it simply codified the FCC’s existing EEO rules for all television broadcasters by providing that the Commission “shall not revise” them. By including this provision in the 1992 Cable Act, which gave television broadcasters carriage rights on cable systems, Congress appeared to be trying to ensure that broadcast television stations and cable television operators were subject to comparable EEO requirements.

⁴⁵ 1992 Cable Act, Section 22(a). These findings are quoted in Section b. *infra*.

⁴⁶ LTVG Comments at 28-29; Golden Orange Comments at 24-27.

⁴⁷ LTVG Comments at 28-29; Golden Orange Comments at 18-24.

⁴⁸ Golden Orange Comments at 26-27.

⁴⁹ *Lutheran Church*, 141 F.3d at 356. If Golden Orange is suggesting that the D.C. Circuit invalidated only certain portions of the 1992 EEO program requirements and left others in effect – i.e., severing the unconstitutional portions – that position is untenable. The *Lutheran Church* decision states simply that the court held the “EEO program requirements” unconstitutional, and nowhere suggests that any portion of those requirements were severed and left in effect.

⁵⁰ *Lutheran Church*, 141 F.3d at 356.

whether it had authority to promulgate the nondiscrimination requirement.⁵¹ Thus, after the *Lutheran Church* decision, we believe that we are required by Section 334 to enforce Section 73.2080(a) against television broadcasters as that provision was in effect in 1992, but not the 1992 EEO program requirements, which are a nullity.

27. Although the proscriptive effect of Section 334 narrowed following the court's invalidation of the 1992 EEO program requirements, that provision still remains significant as an expression of Congressional intent. LTVG misses the point when it asserts that Section 334 provides no authority for the Commission to adopt new outreach requirements.⁵² Section 334 cannot be read in isolation. Rather, the Commission must interpret it as one component of a "symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole."⁵³ As discussed in detail below, Section 334 is but one element in a series of Congressional enactments and statements that made it clear that the Commission's broad authority under Title III of the Act to regulate broadcasters in the public interest embraced the authority to regulate their EEO practices. Reading the entire statute and legislative history against the backdrop of the Commission's history of regulating the EEO practices of broadcasters and other media entities leaves no doubt that the Commission has authority to adopt new rules requiring outreach in recruitment by broadcasters – both television and radio broadcasters – as well as MVPDs. It would be perverse indeed to interpret a statutory provision intended by Congress to ensure that all broadcast and multichannel video program providers are subject to comparable EEO requirements in a way that would shield television broadcasters from EEO regulation and thus defeat the purpose of the statute. We therefore reject the wooden and noncontextual interpretation advocated by LTVG and Golden Orange.⁵⁴

b. Congressional Ratification

28. The Commission has maintained nondiscrimination and EEO program requirements for broadcasters for more than 30 years. In 1968, the Commission concluded that the national policy against discrimination and the fact that broadcasters are licensed under the Communications Act to operate in the public interest required the Commission to consider allegations of employment discrimination in licensing broadcast stations.⁵⁵ In 1969, the Commission adopted rules prohibiting broadcast stations from discriminating against any person in employment on the basis of race, color, religion, or national origin, and requiring stations to maintain a program designed to ensure equal opportunity in every aspect of station employment.⁵⁶ It reiterated its view that discriminatory employment practices are incompatible

⁵¹ *Id.*

⁵² LTVG Comments at 29.

⁵³ *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

⁵⁴ See, e.g., *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1068-69 (D.C. Cir. 1997) ("When the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity.")

⁵⁵ See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C. 2d 766 (1968).

⁵⁶ See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C. 2d 240 (1969).

with a station's obligation to operate in the public interest, and relied on Sections 4(i), 303, 307, 308, 309 and 310 in adopting the new rules. Relying on its authority to license and regulate broadcasters in the public interest, the Commission has revised and extended its rules on numerous occasions since 1969 to, *inter alia*, refine its EEO program requirements, require licensees to file information concerning these programs and other statistical employment information with the Commission, and prohibit discrimination against, and require outreach to, women.⁵⁷

29. Over the last 30 years, the Commission has vigorously enforced its EEO requirements, sanctioning broadcast licensees in numerous cases for failing to comply fully with those requirements. Commission decisions enforcing the EEO requirements have been challenged both by licensees who have been sanctioned for noncompliance⁵⁸ and by petitioners who believed that Commission enforcement was not vigorous enough.⁵⁹ Indeed, the Court of Appeals for the D.C. Circuit held more than 20 years ago that the Commission *must* investigate broadcasters' employment practices and, in assessing the character qualifications of broadcast licensees, consider whether they have engaged in intentional employment discrimination.⁶⁰ And the Supreme Court observed in the seminal case addressing the scope of an agency's authority to serve the "public interest" that FCC regulation of the employment practices of its licensees "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."⁶¹

30. As discussed below, during the three decades that the Commission has administered EEO program requirements and nondiscrimination rules, Congress has repeatedly expressed awareness of the rules and has not only acquiesced in them, but has also referred to them approvingly, confirming our view that the Commission has statutory authority to promulgate these rules. Thus, Congress has ratified the Commission's authority to adopt and enforce EEO requirements against broadcasters under its statutory mandate to license and regulate broadcasters in the public interest.

⁵⁷ See, e.g., *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C. 2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340, and 342, and Adding the Equal Employment Program Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680, and 73.793*, 32 F.C.C. 2d 708 (1971); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C. 2d 226 (1976) ("1976 Report and Order"). See also *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 F.C.C. 2d 2320 (1978) (delineating the Commission's investigative jurisdiction and methods of cooperation with the Equal Employment Opportunity Commission ("EEOC")).

⁵⁸ See, e.g., *San Luis Obispo Broadcasting Ltd. Partnership*, 13 FCC Rcd 1020 (1998); *Valley Television, Inc.*, 12 FCC Rcd 22795 (1998); *Congaree Broadcasting, Inc.*, 5 FCC Rcd 7691 (1990); *South Plains Broadcasting Company, Inc.*, 101 F.C.C. 2d 1364 (1985).

⁵⁹ See, e.g., *Davidson County Broadcasting Company, Inc.*, 12 FCC Rcd 12245 (1997); *Broadcast Associates, Inc.*, 11 FCC Rcd 15479 (1996); *Buckley Broadcasting Corp.*, 11 FCC Rcd 6628 (1996); *Lanser Broadcasting Corp.*, 10 FCC Rcd 12121 (1995); *Ogden Broadcasting of South Carolina, Inc.*, 7 FCC Rcd 1895 (1992).

⁶⁰ *Bilingual*, 595 F.2d at 628-29 ("[I]n implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.").

⁶¹ *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

31. There is a substantial body of case law establishing the principle that congressional approval and ratification of administrative interpretations of statutory provisions, including those granting jurisdiction to regulate, can be inferred from congressional acquiescence in a long-standing agency policy or practice.⁶² The inference of ratification from congressional acquiescence in the Commission's exercise of authority to adopt and enforce EEO regulations is particularly strong. As noted above, the Commission has consistently taken the position over a very long period of time -- 30 years -- that it has authority under its public interest mandate to adopt and enforce EEO rules, and the obligations arising under those rules have become a major component of broadcasters' obligation to serve the public interest.⁶³ Moreover, as noted above, the Commission has enforced its regulations vigorously. These are not obscure agency rules that could have gone unnoticed by Congress.

32. But congressional ratification of the Commission's authority to adopt EEO rules need not be inferred solely from congressional acquiescence in the Commission's exercise of that authority over a period of many years. Congress has, in two major pieces of legislation, *expressly* approved and ratified the Commission's authority to regulate the EEO practices of its broadcast licensees and other media entities as well.

33. In 1984, Congress enacted Section 634 of the Communications Act⁶⁴ as part of the Cable Communications Policy Act of 1984.⁶⁵ Although the Commission at that time already had rules in place regulating the EEO practices of cable operators as well as broadcasters, Section 634 was intended to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations."⁶⁶ Section 634 granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring cable operators to "establish, maintain, and execute a positive continuing

⁶² See, e.g., *Haig v. Agee*, 453 U.S. 280, 300-06 (1981) ("*Haig*") (long-standing interpretation by the Secretary of State of its power under Passport Act of 1926 as encompassing the power to revoke passports to prevent damage to national security or foreign policy was ratified by congressional acquiescence, even though Secretary exercised power infrequently); *Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978) ("*Lorillard*") (Congress is presumed to be aware of administrative and judicial interpretations of a statute and to adopt and ratify those interpretations when it re-enacts a statute without change or incorporates in a new law sections of a prior law that have a settled interpretation); *Zemel v. Rusk*, 381 U.S. 1, 9-13 (1965) ("*Zemel*") (Secretary of State's interpretation of Passport Act of 1926 as authorizing him to impose area restrictions was ratified by Congress when it left untouched the Secretary's broad rulemaking authority when it later enacted legislation relating to passports); *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 313-15 (1933) ("administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful").

⁶³ See, e.g., *1969 Report and Order*, 18 F.C.C. 2d at 241-42; *1976 Report and Order*, 60 F.C.C. 2d at 229; *Report*, 9 F.C.C. Rcd at 6285-87.

⁶⁴ 47 U.S.C. § 554.

⁶⁵ Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act").

⁶⁶ H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), *reprinted in* [1984] U.S. Cong. News 4655. The Senate bill that was ultimately enacted, S. 66, did not contain EEO provisions. The EEO provisions that were eventually enacted as Section 634 originated in Section 635 of H.R. 4103, which is explained in H.R. Report No. 934, discussed below. The Senate adopted the explanation of H.R. 4103 contained in H.R. Report No. 934. See 130 C.R. S.14285 (Oct. 11, 1985), *reprinted in* [1984] U.S. Cong. News 4738.

program of specific practices designed to ensure equal opportunity in every aspect of its employment policies and practices⁶⁷

34. The legislative history of Section 634 makes it unmistakably clear that Congress believed that the Commission already possessed authority to regulate the EEO practices of mass media entities -- broadcast as well as cable. The House Commerce Committee Report on the bill proposing the provisions on which Section 634 was based explicitly confirmed the Commission's authority to adopt EEO rules. The House Commerce Committee stated:

It is well established that the Commission has the authority to regulate employment practices in the communications industry. Among the Commission's efforts in the equal employment opportunity (EEO) area over the last several years has been the enforcement of employment standards in the cable industry. Section 634 endorses and extends those standards.

Because of the potentially large impact cable programming and other services provided by the cable industry has on the public, the employment practices of the industry have an importance greater than that suggested by the number of its employees. The committee strongly believes that *equal employment requirements are particularly important in the mass media area* where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.⁶⁸

35. In addition to the explicit recognition of the Commission's broad and "well established" authority to regulate employment practices in the communications industry, the legislative history of Section 634 shows that Congress viewed the legislation as codifying, strengthening and building upon the Commission's pre-existing regulatory scheme, which it viewed as well within the Commission's statutory authority. For example, the House Report states that the legislation "codifies and strengthens the Commission's existing equal employment opportunity regulations."⁶⁹ Further, it states that the statutory definition of the entities that are subject to the EEO requirements "endorses the Commission's current practice of reviewing compliance with EEO standards by cable systems and other employment units with more than 5 employees, and extends the applicability of EEO requirements to headquarters operations."⁷⁰ Similarly, it states that the provisions specifying the requirements for Commission EEO rules "conform in large part to the Commission's required EEO program under existing regulations."⁷¹

36. Additional evidence of congressional ratification can be found in the Cable Television Consumer Protection and Competition Act of 1992,⁷² which further strengthened the cable EEO requirements, extended those requirements to all MVPDs, and codified the Commission's EEO program and nondiscrimination requirements as applied to broadcast television licensees. Moreover, Congress once again explicitly acknowledged the existence of the Commission's broadcast and cable EEO

⁶⁷ 47 U.S.C. § 554(b), (c), (d).

⁶⁸ H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) (emphasis added).

⁶⁹ *Id.* at 86.

⁷⁰ *Id.*

⁷¹ *Id.* at 87.

⁷² Pub. L. No. 192-385, 106 Stat. 1460.

requirements and proclaimed that vigorous enforcement of those rules served the public interest. Congress made the following findings in Section 22(a) of the 1992 Cable Act:

- (1) *despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;*
- (2) increased numbers of females and minorities in positions of management authority in the *cable and broadcast television industries* advances the Nation's policy favoring diversity in the expression of views in the electronic media; and
- (3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.⁷³

By extending the cable EEO requirements to every entity that provides multiple channels of video programming, such as MMDS operators and DBS licensees, Congress was building upon and closing the gaps in the Commission's regulatory scheme, ensuring that *every* electronic mass media provider would be subject to EEO regulations enforced by the Commission.

37. As noted above, the 1992 Cable Act not only strengthened and extended the cable EEO requirements, it also codified the Commission's EEO requirements for broadcast television stations in Section 334 of the Act.⁷⁴ Section 334 thus explicitly recognizes the existence of the Commission's broadcast EEO Rule and requires the Commission to keep its EEO requirements in effect for television broadcasters.⁷⁵

38. Furthermore, Section 22(g) of the 1992 Cable Act required the Commission to report to Congress within two years on "the effectiveness of [the Commission's] procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority." The Commission was required to include in that report "such legislative recommendations to improve equal employment opportunity in the *broadcasting and cable industries* as it deems necessary."⁷⁶ Congress would not have directed the Commission to review the effectiveness of its broadcast and cable EEO policies and regulations then in effect, and recommend whether further legislative action was necessary, had Congress not believed that those policies and regulations were within the Commission's lawful authority.⁷⁷ Thus,

⁷³ 1992 Cable Act, Section 22(a) (emphasis added). *See also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 111-17 (1992).

⁷⁴ 47 U.S.C. § 334. *See also* Conf. Rep. No. 862, 102d, 2d Sess. 97 (1992).

⁷⁵ As discussed above, to the extent that the court in *Lutheran Church* invalidated the 1992 EEO rules, the Commission cannot continue to enforce them. But Section 334 does require that the Commission continue to enforce against television broadcasters the nondiscrimination requirement, which was not invalidated.

⁷⁶ 1992 Cable Act, Section 22(g) (emphasis added).

⁷⁷ We note that the Commission's EEO rules for broadcasters apply to radio as well as television stations.

Section 22(g) is further evidence of Congress' affirmative approval of the Commission's authority to adopt equal employment opportunity requirements for broadcasters.⁷⁸

39. It is within this historical context that the Commission's statutory authority to regulate the EEO practices of broadcast licensees must be viewed. As discussed above, the Supreme Court has inferred congressional ratification of administrative action from "nothing more than silence in the face of an administrative policy."⁷⁹ Here, the inference of congressional ratification rests on far firmer ground, including explicit statements confirming the Commission's authority to regulate the EEO practices of media companies, legislation that codified and expanded the reach of Commission EEO regulations, and a directive to the Commission to review the effectiveness of its EEO regulations and report back to Congress on how they are working and how they could be improved.⁸⁰ Under these circumstances, the inference of congressional ratification is inescapable.⁸¹

40. There is another compelling reason to find in the current statutory context that Congress has ratified our authority to regulate the EEO practices of broadcasters. The Supreme Court has held on numerous occasions that courts should interpret a statute "as a symmetrical and coherent regulatory scheme" and "fit, if possible, all parts into an harmonious whole."⁸² In interpreting statutes granting administrative or judicial jurisdiction, the Supreme Court has held specifically that any interpretation of congressional intent that will result in a "bizarre jurisdictional patchwork" is to be disfavored absent

⁷⁸ See, e.g., *Bob Jones University v. United States*, 461 U.S. 574 (1983) ("*Bob Jones University*").

⁷⁹ *Haig*, 453 U.S. at 300, citing *Zemel*, 381 U.S. at 11 and other Supreme Court cases.

⁸⁰ The facts here give rise to an even stronger inference of congressional ratification than was present in *City of New York v. FCC*, 486 U.S. 57 (1988), for example. In that case, cable television franchisors challenged the Commission's authority, in adopting regulations establishing cable signal quality technical standards, to forbid state and local authorities to impose more stringent technical standards. In determining that the Commission acted within its statutory authority in preempting state and local standards, the Supreme Court found that Congress in the Cable Act of 1984 endorsed the Commission's longstanding policy of federal preemption of cable technical standards, and that it was "quite significant" that there was no evidence of any intent by Congress to "overturn the Commission's decade-old policy without any discussion or even any suggestion that it was doing so." *Id.* at 67-68. In the case of the Commission's jurisdiction to regulate in the EEO area, there is affirmative evidence of congressional approval of the Commission's statutory authority.

⁸¹ See, e.g., *City of New York v. FCC*, *supra*; *Bob Jones University*, 461 U.S. at 601 (finding that "Congress affirmatively manifested its acquiescence" in the IRS' statutory interpretation that educational institutions that discriminate on the basis of race are not eligible for an income tax exemption when it enacted a new provision denying tax-exempt status to social clubs that discriminate on the basis of race); *U.S. v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940); *Lorillard*, 434 U.S. at 580 (where Congress adopted a new law incorporating sections of a prior law, it can be presumed to have had knowledge of and approved the interpretation given to the prior law); *Zemel*, 381 U.S. at 12 (Congress ratified Secretary of State's authority to refuse to impose area restrictions on travel when "[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act.").

⁸² *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted from quotation), quoting *Gustafson v. v. Alloyd Co.*, 513 U.S. 561, 569 (1995) and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

legislative history or a persuasive functional argument to the contrary.⁸³ In this case, Congress has *explicitly* granted the Commission authority to regulate the EEO practices of television broadcasters, cable operators, and all other MVPDs, including such relative newcomers as DBS and MMDS operators.⁸⁴ Thus, rejecting the inference of congressional ratification would leave us in the anomalous situation of having jurisdiction to regulate the EEO practices of broadcast television and MVPDs, but *not* radio broadcasters. There is no indication in the legislative history that this was Congress' intent and none of the broadcasters commenting in this proceeding even attempts to explain why Congress would have intended such a result.

41. Two parties do, however, challenge the Commission's contention that Congress has ratified the Commission's authority to regulate the EEO practices of broadcasters. StBAs asserts that "any claim that Congress has ratified this new rationale is unsupportable in light of Congressional silence on the matter since the Court of Appeals decisions in *Lutheran Church* and *Broadcasters*," adding that "Congress could have created a statutory program or mandated a new regulatory approach in this area – but did not."⁸⁵ Similarly, LTVG argues that "Congress cannot possibly have 'ratified' by its past inaction a set of 'outreach' rules that, according to the FCC, represents a radical departure from the FCC's entire past history and practice with respect to broadcast EEO regulation."⁸⁶

42. These comments reflect a fundamental misunderstanding of the nature and effect of Congressional ratification of our statutory authority. As explained above, the Commission since 1969 has interpreted the Communications Act's grant of authority to license and regulate broadcasters as the public interest, convenience and necessity require as authorizing the Commission to regulate the equal employment practices of broadcasters. Specifically, it has interpreted the statute as granting it authority to prohibit broadcast stations from engaging in employment discrimination and to require them to maintain programs designed to ensure equal opportunity in all aspects of station employment, including recruitment. It is that interpretation of the *scope of the Commission's statutory authority under the Communications Act* that Congress has ratified over the course of many years.

43. Once Congress ratified the Commission's interpretation of the scope of its statutory authority, as it clearly had by 1984, the Commission could exercise that authority by adopting new EEO rules to replace those held unconstitutional by the D.C. Circuit. Thus, Congress's later "silence" after the *Lutheran Church* and *Broadcasters* decisions is immaterial. And the fact that Congress did not act to "mandate" a new EEO regulatory regime is equally immaterial. Having already made it abundantly clear that the Communications Act authorized the Commission to regulate the EEO practices of broadcasters, there was no need for Congress either to mandate or once again to authorize Commission action in this area.⁸⁷ Thus, the arguments of the StBAs and LTVG that Congress could not have ratified the Commission's authority to adopt new or different EEO rules have no merit.⁸⁸

⁸³ *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 799 (1985); *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 (1980).

⁸⁴ 47 U.S.C. §§ 334, 554.

⁸⁵ StBAs Comments at 31.

⁸⁶ LTVG Comments at 31.

⁸⁷ See cases discussed at notes 62, 78-81, *supra*. For example, in *Zemel v. Rusk*, 381 U.S. 1 (1965), the Supreme Court held that the Secretary of State's imposition of new area restrictions on passports in 1961 was within its statutory authority under the Passport Act of 1926 because Congress had ratified the Secretary's authority to

44. For the foregoing reasons, we find that Congress has granted us authority to regulate the EEO practices of broadcast television and radio licensees. Whatever uncertainty may have existed 30 years ago concerning the Commission's public interest mandate and whether it is broad enough to authorize EEO regulation, it has now been resolved.

c. Other Authority.

45. We have relied in the past on our public interest mandates to foster diversity of programming and diversity of ownership as additional sources of statutory authority for broadcast EEO rules.⁸⁹ We believe that the statutory authority discussed above is ample to support the adoption of broadcast EEO rules in this proceeding, and see no need for additional sources of statutory authority. Therefore, we decline to address the complex and elusive issues of whether there is a nexus between diversity in employment and diversity of programming or ownership and, if so, the extent of that nexus.

B. Broadcast and MVPD EEO Rules, Policies, and Forms

1. Anti-Discrimination Provisions

46. In the *Second NPRM* we proposed to retain the nondiscrimination provisions of our broadcast and MVPD EEO rules.⁹⁰ We noted that the anti-discrimination provision of the broadcast EEO Rule⁹¹ was not challenged in *Association*. Nonetheless, in rejecting the contention that the unlawful Option B could be severed from the EEO rule, the court stated that the "entire rule" must be vacated.⁹² In

impose such restrictions in 1952 by enacting passport legislation without tampering with the rulemaking authority granted to the Secretary in the 1926 Act. The Secretary's exercise of that authority in 1961 to restrict travel to Cuba was deemed a proper exercise of its statutory authority even though no passports were required prior to 1961 – or at the time of Congressional ratification – for travel anywhere in the Western Hemisphere.

⁸⁸ The NAB asserts that the "outcome of [a continuous pattern of broad, meaningful] outreach, namely, a highly qualified, diverse workforce, causes the best possible product for radio and television stations . . ." NAB Comments at 68. While professing to support the adoption of EEO rules, at least if they conform to its proposal, the NAB nevertheless asserts that it "does not believe that the Commission's authority to re-regulate in this area is indisputable." NAB Comments at 63. It is not clear why the NAB is advocating rules that it believes the Commission has questionable authority to adopt. In any event, it does not address the Commission's showing that Congress has ratified the Commission's authority under the public interest standard to regulate the EEO practices of broadcasters. Nor does it attempt to rationalize the bizarre jurisdictional patchwork that would result if the Commission concluded that it has authority to regulate the EEO practices of cable operators and all other MVPDs under Section 634 of the Act - which is undisputed and indisputable - but has no authority to regulate the EEO practices of broadcasters.

⁸⁹ See, e.g., Report and Order, ¶¶ 42-62, 15 FCC Rcd at 2346-2358.

⁹⁰ 16 FCC Rcd at 22849.

⁹¹ Section 73.2080(a).

⁹² 236 F.3d at 23. In its rehearing petition, the Commission interpreted the court's decision as vacating only those subsections of the EEO rule involving the Option A and B EEO program requirements, i.e., 47 C.F.R. § 73.2080(c), (d) and (e), as well as those portions of subsections (f), (g), and (i) that cross-reference those provisions. Commission Petition for Rehearing and Suggestion for Rehearing En Banc, filed March 2, 2001, at 10 n.1. The court did not address this interpretation in its rehearing order, and no commenter has suggested that the court intended to invalidate the nondiscrimination requirement.

order to avoid any confusion arising from the language in the court's decision, we recodify the nondiscrimination requirement. Nondiscrimination is an essential component of every licensee's obligation as a trustee of a valuable public resource. Moreover, a finding that a broadcaster has engaged in employment discrimination would raise a serious question as to its character qualifications to be a Commission licensee. In *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*,⁹³ the court stated that "[a] documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship."⁹⁴ Finally, we are required by statute to prohibit discrimination by broadcast television licensees and MVPDs.⁹⁵

47. As proposed in the *Second NPRM*, we will retain our policy of generally deferring action on individual complaints of employment discrimination against broadcasters and MVPDs pending final action by the Equal Employment Opportunity Commission ("EEOC") or other government agencies and/or courts established to enforce nondiscrimination laws. We will also retain the discretion to take action, notwithstanding the absence of a final decision by the EEOC or other agency/court, where the facts of a particular case so warrant. As indicated in the *Report and Order*, our policy generally reflects the fact that Congress intended the EEOC to be primarily responsible for the resolution of discrimination complaints and our separate adjudication of such complaints could result in duplicative or inconsistent decisions.

48. Named State Broadcasters Associations urge that we should defer entirely to the EEOC or other appropriate agencies or courts concerning discrimination. StBas construes the *Second NPRM* as reflecting a proposal that only individual complaints would be deferred and that we would directly consider complaints alleging discriminatory patterns and practices.⁹⁶ This is incorrect. We do not intend to exercise our discretion routinely to consider allegations of discrimination before an EEOC or court decision has been made. This will be true whether the complaints allege a single instance or multiple instances of discrimination or discriminatory patterns and practices. In the *Report and Order*, we indicated that any exceptions to our general policy would be decided on a case-by-case basis. We cited as examples that we might consider alleged discrimination prior to a final EEOC or court ruling, under certain circumstances, if there are well-supported allegations of discrimination made by a large number of individuals against one broadcast station or MVPD unit, or well-supported allegations of discrimination that shock the conscience or are particularly egregious. This does not, however, mean that we will depart from our general policy in every instance in which multiple allegations or alleged discriminatory practices are present.

49. We will also retain the proviso in our broadcast anti-discrimination rule that religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees. We will also continue our policy of applying the same proviso to television broadcast licensees.⁹⁷

⁹³ 595 F.2d 621 (D.C. Cir. 1978).

⁹⁴ *Id.* at 629.

⁹⁵ 47 U.S.C. §§ 334 and 554. See ¶¶ 19-20, 26, *supra*. Section 554(b) also prohibits MPVDs from discriminating on the basis of age.

⁹⁶ StBAs Comments at 35-39.

⁹⁷ As discussed above, because the nondiscrimination requirement was not invalidated by the court, we must

50. The Rule adopted by the *Report and Order* defined a “religious broadcaster” as “a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.”⁹⁸ In the *Report and Order*, we clarified that, in the event of a controversy, we would determine on a case-by-case basis whether a licensee was a religious broadcaster by considering such factors as whether it operates on a non-profit basis, whether it has a distinct religious history, whether the entity’s articles of incorporation set forth a religious purpose, and whether it carried religious programming.⁹⁹ Thus, an entity could, based on the totality of the circumstances, qualify as a “religious broadcaster” even if it operated as a for-profit entity or lacked an extensive religious history. National Religious Broadcasters (“NRB”) urges that we should clarify the definition by indicating that a for-profit broadcaster would qualify as “religious” if at least 50 percent of its airtime was devoted to religious programming and it has either organizational documents reflecting a religious purpose or a distinct religious history.¹⁰⁰ Lutheran Church—Missouri Synod (“Lutheran Church”) urges that the interjection of a requirement for a specific percent of religious programming is unnecessary and could create confusion as to the definition of religious programming.¹⁰¹ We find no need to revisit this matter.¹⁰² We have encountered few problems concerning the definition of a religious broadcaster since we initiated this policy. Further, the adoption of a test based on a prescribed percentage of “religious programming” could create unnecessary difficulties in determining whether particular programming is “religious.”

51. Two commenters, Doreen Vincent and John Bronikowski, have urged us to extend the scope of the anti-discrimination rules to encompass discrimination based on physical disabilities. In the *Report and Order*, we noted that both Congress and the Commission have taken steps to ensure that persons with disabilities share in the benefits of modern communications services and products. We also noted that the broad outreach requirements of the EEO rules being adopted would benefit all potential job applicants, including those with disabilities, in obtaining information about broadcast employment opportunities. We nonetheless found the proposals beyond the scope of the proceeding.¹⁰³ We still conclude that the issue is beyond the scope of the proceeding. We do not have a sufficient record to determine the feasibility of providing further relief within the context of our EEO rule.

2. Broadcast EEO Program Requirements

a. Rules and Policies

i. General Considerations

continue to enforce it against television broadcasters under Section 334.

⁹⁸ 47 C.F.R. § 73.2080(a).

⁹⁹ *Report and Order*, ¶157-161, 15 FCC Rcd at 2392-93.

¹⁰⁰ NRB Comments at 4. NRB correctly notes that our reference to “articles of incorporation” in the *Report and Order* was intended to refer to any valid organizational documents of an entity, not just to a document entitled “articles of incorporation.”

¹⁰¹ Lutheran Church Reply Comments at 3.

¹⁰² *Report and Order*, ¶ 157-161, 15 FCC Rcd at 2392-93.

¹⁰³ *Report and Order*, ¶ 74, 15 FCC Rcd at 2362-63.

52. Several broadcast commenters have challenged the basis for our adopting any EEO Rule for broadcasters. Initially, they seek to characterize our proposals in the *Second NPRM* as constituting “re-regulation.”¹⁰⁴ In fact, we have never “de-regulated” in this area; the court decisions that have invalidated various aspects of our EEO rules have been premised on specific legal defects found in our programs, not on a finding that nondiscrimination rules or outreach requirements are unnecessary.

53. NAB and StBAs stress that the broadcast industry has demonstrated its commitment to EEO, especially in the period since our Rule was invalidated in *Lutheran Church*. They argue that the industry has made meaningful EEO efforts even in the absence of a rule requiring them to do so and, therefore, that there is no need for an EEO Rule.¹⁰⁵

54. NAB cites the creation more than 25 years ago of the NAB Career Center, which has undertaken a number of activities designed to foster nondiscrimination and diversity, including conducting a job fair in cooperation with the Broadcast Education Association during the annual NAB convention. NAB also cites its maintenance of an Internet web site that serves as a clearinghouse for information concerning job openings at member stations. Furthermore, the NAB Educational Foundation (“NABEF”) operates various programs to provide education, experience and training for employment in the broadcast industry. NABEF also makes contributions to organizations that support minority interns and training. NAB provides fellowships for professional managers, including minorities and women, to attend its management development programs and its Broadcast Leadership Training Program. NAB also notes that state associations conduct job fairs and maintain job web sites. NAB argues that these efforts have continued even in the absence of federal regulations and contends that they will continue irrespective of the outcome of this proceeding.¹⁰⁶

55. StBAs points to the creation of Internet job web sites by the National Alliance of State Broadcasters Associations (“NASBA”), and the state broadcast associations themselves, which continue to function notwithstanding the absence of an EEO rule. It further indicates that 29 state broadcast associations sponsor, co-sponsor, or significantly participate in job fairs. StBAs also notes that state associations support internship programs by providing stipends for student interns or directly sponsoring intern programs, and that five associations have provided significant support for mentoring programs. Nearly two-thirds of the state associations provide fellowships and scholarships. Also, associations in several states have created partnerships with local organizations in implementing various programs designed to promote outreach.

56. StBAs further contends that we can rely on the broadcast industry to engage in active recruitment without an EEO Rule because broadcasters have a “strong, inherent incentive” to attract a robust stream of qualified men and women of all racial and ethnic backgrounds.¹⁰⁷ StBAs contends that there is no need for an EEO Rule to deter discrimination or to curtail discriminatory effects from reliance on word-of-mouth recruitment methods. It further contends that there is no evidence that the broadcast industry as a whole engages in discrimination or that specific recruiting practices are needed as a remedy for discrimination. StBAs also suggests that any regulation designed to deter discrimination must be

¹⁰⁴ See, e.g., StBAs Comments at 7.

¹⁰⁵ StBAs Comments at 32.

¹⁰⁶ NAB Comments at 4-10.

¹⁰⁷ StBAs Comments at 12.

limited to intentional discrimination because constitutional prohibitions against discrimination as well as Title VII of the Civil Rights Act of 1964 are limited to intentional discrimination.¹⁰⁸

57. First, our concern is not limited to intentional discrimination. Thus, it is not based on Constitutional provisions or on Title VII, but on the public interest standard in the Communications Act. In adopting the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”), Congress expressly found in pertinent part: “rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.”¹⁰⁹ Congress has made it clear that the public interest standard is sufficiently broad to cover not only intentional discrimination, but also discrimination that may arise as a result of practices and policies that are not intentionally discriminatory. Further, our policy is not limited to imposing sanctions in response to specific past discrimination; it is also intended to deter discrimination in the first instance. Thus, our policy is designed to prevent both intentional and unintentional discriminatory practices in the broadcast and MVPD industries, and to ensure equal opportunity in employment practices, including recruitment.

58. Second, it is not necessary to find that the broadcast industry “as a whole” has engaged in discrimination in order to justify regulations to prevent discrimination. We do not suspect that the entire broadcast industry, or even most of it, engages in intentional or unintentional discrimination.¹¹⁰ Nonetheless, discrimination is so fundamentally inconsistent with the public interest that rules are justified to deter even the possibility of discrimination. Thus, the requirements we are adopting today are not, as characterized by StBAs, “essentially remedial.”¹¹¹ They are designed to prevent discrimination, not to provide a remedy after it occurs.

59. Third, although we commend the broadcast associations for the various activities detailed in their comments, they do not demonstrate that an EEO rule is unnecessary. In the period since *Lutheran Church*, we have continuously held out the possibility that we would adopt new rules designed to remedy the problems identified by the court. Indeed, for approximately nine months – from April 2000 to January 2001 – we had new rules in place. Many of the initiatives cited by the associations may have been responsive to those requirements. We cannot be certain what would occur if we announced that we would not be adopting new rules. Moreover, most of the activities cited by NAB and StBAs were the result of association efforts.¹¹² There is little evidence in the record as to the activities engaged in by licensees generally. Although we agree that broad outreach is in the long-term best interest of the

¹⁰⁸ StBAs Comments at 31-34.

¹⁰⁹ 1992 Cable Act, Section 22(a).

¹¹⁰ MMTC submitted a study long after the comment period closed in this proceeding that purports to show intentional discrimination in the broadcast and MVPD industries based upon lower than average minority employment rates. *See ex parte* letter dated October 1, 2002, from MMTC to FCC, Exhibit 1 (“The Reality of Intentional Job Discrimination in Metropolitan America – 1999” by Alfred W. Blumrosen and Ruth G. Blumrosen). Given that we have not thoroughly analyzed this study nor received comment on it, we do not rely on its findings to support adoption of new EEO rules. At any rate, we are not convinced that deviations below the average employment rate can be equated with intentional discrimination.

¹¹¹ StBAs Comments at 34.

¹¹² Furthermore, the Associations’ efforts have not been universal; we can assume, for example, that if 29 State Associations (except for North Carolina, which is not included in StBAs’ comments) participated in job fairs, the others did not.

broadcast industry, it has become apparent based on the record in this proceeding, that self-interest alone is not enough.¹¹³ We cannot be confident that individual licensees – who are the focus of our regulations – would engage in outreach efforts in the absence of a rule. Indeed, the American Federation of Television and Radio Artists (“AFTRA”), a national labor organization with membership in the broadcast industry, states that its members have reported that broadcasters and MVPDs have reduced their participation in job fairs and other outreach and recruitment efforts since 1998.¹¹⁴

60. Some broadcasters support the adoption of an EEO rule. Radio One, Inc. (“Radio One”), which is minority controlled, owns or operates 65 radio stations and is the nation’s seventh largest radio broadcasting company. Radio One contends that the EEO Rule is especially necessary in view of the recent consolidation in the broadcast industry. It argues that group owners are seeking to achieve economies of scale by “clustering” multiple stations in local markets. As a result of more centralized operations, it says, the number of quality broadcasting jobs, particularly top management positions, has diminished. Radio One argues that this places pressure on minorities and women in competing for fewer jobs in the marketplace where they are already underrepresented, particularly at the top level.¹¹⁵ The EEO Rule also was supported by Inner City Broadcasting Corporation (ICBC), the second largest Black owned and operated radio company in America.¹¹⁶ Charles Warfield, President and Chief Operating Officer of subsidiary ICBC Broadcast Holdings, Inc., cited from his own experience in attending a 1997 meeting of corporate executives and general managers of a 96-station group. Only six of the attendees were Black, and of them, only three are still employed in the broadcast industry; a reduction which he attributed to consolidation in the industry.¹¹⁷

61. Our proposed EEO requirements also are generally supported by the MVPD industry. The National Cable & Telecommunications Association (“NCTA”), the principal trade association of the cable industry, generally supports the proposed EEO regulations applicable to MVPDs, which are comparable to those applicable to broadcasting. NCTA states that EEO is “the fair policy for our employees and the right policy for our industry.”¹¹⁸ NCTA also states that there is a need for the EEO rules because there “must be no doubt that cable systems” reach out to all sectors of their communities in recruiting new employees so as to ensure that all qualified applicants have an opportunity to apply for and be considered as job candidates.¹¹⁹ NCTA further emphasizes that it supports the requirement to recruit for all vacancies so companies will offer all prospective employees an equal opportunity to be considered

¹¹³ June 24, 2002 EEO *En Banc* Hearing, Tr. 71-72.

¹¹⁴ AFTRA Comments ¶ 19; statement of Gregory Hessinger, AFTRA National Executive Director, June 24, 2002 EEO *En Banc* Hearing at Tr. 37. *See also* NAB Reply Comments at 17 (NAB criticizes AFTRA’s contention as lacking specificity).

¹¹⁵ Radio One Comments at 5-6.; statement of Catherine L. Hughes, Founder and Chairperson of Radio One, June 24, 2002 EEO *En Banc* Hearing at Tr. 77 *et seq.*

¹¹⁶ June 24, 2002 EEO *En Banc* Hearing at Tr. 98 *et seq.*

¹¹⁷ June 24, 2002 EEO *En Banc* Hearing at Tr. 100-101.

¹¹⁸ NCTA Comments at 1.

¹¹⁹ NCTA Comments at 3.

for jobs.¹²⁰ It further supports the requirement to recruit widely enough so no segment of the community is left out.¹²¹

62. Discrimination may be easy to hide and difficult to prove.¹²² Allegations of discrimination may never be fully litigated because a violator will elect to settle any litigation before it reaches the stage of a final judgment.¹²³ It is thus impossible to quantify reliably the extent of actual discrimination that exists today.

63. Several commenters cite a 2001 study by the Radio-Television News Directors' Association ("RTNDA") and Ball State University that, they contend, shows that minorities and females still face difficulties in obtaining broadcast employment, especially in accessing higher level positions.¹²⁴ According to the RTNDA study, women comprise 39.7 percent of the television work force and 37.4 of the radio work force, and minorities represent 24.6 percent of the television and 10.7 percent of the radio work force. Nonetheless, only 20.2 percent of television news directors are women and only eight percent are minorities. Further, only 21 percent of radio news directors are women while only 4.4 percent are minorities. The RTNDA study also reflects that 91.3 percent of television station general managers are White (8.7 percent minority) while 87.4 percent are male (12.6 percent female). In radio, 94.3 percent of general managers are White (5.7 percent minority) and 87.7 percent are male (12.3 percent female).

64. StBAs cites the RTNDA report for the proposition that minorities held almost a quarter of all jobs in television news and that the number of minorities in radio news had increased. StBAs compares this with newspaper journalists, of whom only 12.1 percent are minorities. StBAs does not otherwise address data concerning minority and female employment, stating that to establish a target level of representation for any group would amount to a quota system that would unlawfully deny equal protection.¹²⁵

65. On July 15, 2002, RTNDA released its study of the industry for 2002.¹²⁶ The 2002 data reflects that minorities hold 20.6 percent of the jobs in television news (19 percent in English language news rooms), down from 24.6 percent in 2001. The percentage of minorities in radio news was eight percent, down from 10.7 percent in 2001. The percentage of minority news directors rose from 2001 to 9.2 percent in television and 5.1 percent in radio. Minorities held 5.2 percent of general manager jobs in television (down from 8.7 percent in 2001) and 3.8 percent in radio (down from 5.7 percent in 2001). In

¹²⁰ NCTA Comments at 4.

¹²¹ NCTA Comments at 5, 9.

¹²² See MMTC Comments at 42-47.

¹²³ As an example, EEOC reported that, from 1997 to 2001, it filed 1,963 lawsuits alleging discrimination, of which 1,723 were resolved. Of resolutions, 57.73 percent were by consent decree, 27.5 percent were by settlement agreement, and 2.13 percent were by voluntary dismissal. Only 12.69 percent were resolved by court order. EEOC, "A Study of the Litigation Program Fiscal Years 1997-2001," released August 13, 2002, at ¶ B.2, B.3, and B.7. See <http://www.eeoc.gov/litigation/study/study.htm>.

¹²⁴ AWRP Comments at 3 and Appendix A.

¹²⁵ StBAs Reply Comments at 13-14.

¹²⁶ <http://www.rtna.org/research/womin.shtml>. A copy of this document has also been placed in the record in this proceeding.

2002, women comprised 38.6 percent of the television news workforce (down from 39.7 percent in 2002) and 32.5 percent of the radio news workforce (down from 37.4 percent in 2001). The percentage of women news directors increased to 25.9 percent in television (up from 20.2 percent in 2001) and 22.3 percent in radio (up from 21.9 percent in 2001). Women held 13 percent of general manager jobs in television and 11 percent in radio.

66. The relevance of this data does not derive from any intent to require that the workforce presence of minorities and females match that of the presence of those groups in the population, as suggested by StBAs, or to create any preference for any group over any other. The data are nonetheless relevant to demonstrate the continuing need for broad outreach and recruitment efforts.

67. Many of the opponents of our EEO program cite language from the *Report and Order* that “[o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and hiring process.”¹²⁷ These parties contend that the broadcast workforce is not homogeneous and that it does not employ insular recruitment and hiring practices to replicate itself.¹²⁸ The cited language was intended to explain why outreach in recruitment as well as a ban on discrimination is necessary to deter discrimination. We did not intend to suggest that every broadcast station has a homogeneous workforce. We recognize that in many significant respects the industry has become more diverse over the past decades. We attribute this in large measure to the fact that the industry has been subject to our various EEO requirements since 1969. As noted, StBAs adverts to the fact that, according to the RTNDA studies, the broadcast media have achieved a greater degree of diversity than the print media – which have not been subject to EEO outreach requirements. Just because a particular station has minority employees, however, does not mean that all job applicants irrespective of their backgrounds will hear of job openings. Stations cannot rely on their employees to disseminate job information widely. While the discriminatory impact of insular recruitment practices, such as word of mouth recruitment, is potentially worse if the work force is homogeneous, all stations need to openly recruit to ensure equal opportunity and access to jobs. The purpose of our rules is to ensure equal opportunity and nondiscrimination for all prospective applicants, not to achieve the proportional representation of particular groups.

68. With respect to insular recruitment practices by broadcasters, StBAs asserts that:

[t]here is also no evidence that word-of-mouth recruitment (*done in conjunction with other recruitment steps* such as use of the Internet job banks, over-the-air advertising, job fairs, etc.) is more extensive than in other industries, much less that it is an inherently discriminatory practice or has led to discriminatory practices by broadcasters in general.¹²⁹

We agree with StBAs that word-of-mouth recruitment is not inherently objectionable when combined with broad outreach. As will be explained below, it is not our intention to prohibit the use of word-of-mouth recruitment, when used in conjunction with other public recruitment sources. Our purpose is to

¹²⁷ *Report and Order*, ¶ 3, 15 FCC Red at 2331; *Second NPRM*, ¶ 15, 16 FCC Red at 22847.

¹²⁸ See, e.g., Comments of StBAs and The Local Television Group.

¹²⁹ StBAs Comments at 31-32 (emphasis added).

ensure that word-of-mouth recruitment practices are not the sole method of recruitment and that all members of the public have an opportunity to compete for available jobs.

69. We accordingly conclude that adoption of new outreach rules for broadcast and MVPDs is supported by the record in this case. The evidence in this proceeding demonstrates an ongoing need to deter discrimination and ensure equal employment opportunity in the broadcasting and MVPD industries. Moreover, Congress has made clear its intention that we should enact EEO rules for the broadcast and MVPD industries.

70. Finally, as noted above, our primary goal in adopting EEO program requirements is to ensure broad outreach in recruitment for broadcast and MVPD employment vacancies. We seek to do so in a manner that affords some flexibility to affected industries. The regulations we are adopting today provide sufficient flexibility. Entities will have broad discretion as to the type of recruitment sources they will use, the number of recruitment sources they will use, and the Prong 3 menu options they will implement. We are also providing that entities in smaller markets may implement fewer menu options than those in larger markets.

ii. EEO Program and Related Provisions

71. In the *Second NPRM*, we proposed a three-prong EEO program requirement designed to ensure equal opportunity to all potential applicants, including all races and both genders, without infringing on the rights of any group. The rules were further designed to be flexible enough to avoid imposing an undue burden and to apply reasonably and effectively to broadcasters and MVPDs in differing circumstances.¹³⁰ Based on our review of the comments, reply comments and other presentations filed in this proceeding, we adopt the proposed program, with some modifications.

72. **Outreach Prong 1 – Recruitment for All Full-time Vacancies.** We will adopt the requirement that broadcasters recruit for all full-time vacancies, except in exigent circumstances. Recruitment for substantially all vacancies using sources designed to achieve broad outreach is necessary to ensure that all segments of the population have an equal opportunity to compete for broadcast (and MVPD) employment and that no segment is subjected to intentional or unintentional discrimination. As discussed above, Congress clearly intended broadcasters to be subject to outreach requirements and our rule is consistent with that intent.

73. NAB challenges the necessity of requiring broadcasters to recruit for all vacancies. NAB's argument initially relies upon the contention that efforts by the broadcast industry to reach out to potential applicants and the effectiveness of our EEO regulations over the past more than 30 years have enabled minorities and women to obtain jobs in broadcasting so that minorities and women will learn of available jobs without the need for broad recruitment. NAB also asserts that broadcasters need the discretion to design recruitment tactics appropriate to particular positions. Next, NAB asserts that the present poor economy has reduced the availability of broadcast jobs so that recruitment for every vacancy is futile.¹³¹

74. We do not agree with these contentions. The effectiveness of our requirements in the past does not justify eliminating them now. Nor can we justify such a conclusion based on recent

¹³⁰ *Second NPRM*, ¶ 15, 16 FCC Rcd at 22847.

¹³¹ NAB Comments at 11-14.

outreach efforts by the broadcast industry, however commendable, given that this has been an area under high scrutiny for some time. We can draw no inference from these facts; therefore, regarding the likely behavior of licensees in the absence of any current on proposed EEO program. Second, our requirements provide sufficient flexibility to design recruitment programs appropriate for different positions and circumstances, as will be discussed below. Finally, the present state of the economy does not justify dispensing with recruitment when jobs become available.

75. As an alternative to the requirement that broadcasters recruit for every vacancy, NAB proposes a rule whereby broadcasters would certify every four years that they have complied with one of three alternatives.¹³² First, NAB suggests that compliance with Office of Federal Contract Compliance Programs ("OFCCP") requirements should suffice as compliance with the Commission's Rule. As a second alternative, NAB proposes that broadcasters could achieve compliance by participating in a Broadcast Career Program operated by their state broadcast association. This refers to the model plan developed by the National Alliance of State Broadcast Associations ("NASBA") (referred to in the *Report and Order* as BEDA), which is attached to StBAs comments.¹³³ The third alternative proposed by NAB is a flexible outreach program developed by the licensee. The proposal would allow broadcasters to choose from a "menu" of eight general (*i.e.*, not related to a specific job vacancy) and eight specific outreach efforts. The general outreach efforts would include sponsorship of, or participation in, job fairs, scholarship, mentoring and intern programs, training programs for existing employees, and industry-wide training programs designed to train minority students for media careers. The specific outreach efforts would include standard recruitment methods (such as placing newspaper or magazine advertisements, making on-air job announcements, etc.) and such methods as posting job notices on Internet web pages. Under NAB's proposal, a licensee would achieve compliance by using two general outreach initiatives, or one general and two specific outreach initiatives, or four specific outreach initiatives.

76. We explained in the *Report and Order* why reliance on OFCCP requirements as a component of our EEO Rule would be inappropriate.¹³⁴ OFCCP regulations place a general nondiscrimination requirement on entities with federal contracts in excess of \$10,000.¹³⁵ The regulations require an "affirmative action compliance plan" for employers who have 50 or more employees and federal contracts of \$50,000 or more.¹³⁶ Enforcement of the plans is based primarily on compliance evaluations that may occur at the discretion of OFCCP.¹³⁷ It would be confusing to the public to have a separate agency with separate requirements and enforcement mechanisms responsible for the EEO outreach efforts of some broadcasters. Moreover, adoption of this proposal would greatly complicate enforcement of our rules by making it necessary for us to consider complaints based on alleged violations of the requirements of another agency, or to deal with situations in which a broadcaster that has claimed exemption based on OFCCP compliance is later found by OFCCP not to be in compliance with its

¹³² NAB submitted a similar proposal in response to the 1998 NPRM; however, its plan at that time contemplated compliance every two years, rather than the four years in its current proposal. *Report and Order*, ¶ 81, 15 FCC Rcd at 2366.

¹³³ StBAs Comments, Exhibit A. NAB also references an alternative plan submitted by StBAs, which we will address below.

¹³⁴ *Report and Order*, ¶ 133, 15 FCC Rcd at 2383.

¹³⁵ See 41 C.F.R. §§ 60-1.4 and 60-1.5.

¹³⁶ See 41 C.F.R. § 60-1.40 and Part 60-2.

¹³⁷ See 41 C.F.R. § 60-1.20.

requirements. A broadcaster may, of course, claim credit for steps taken to comply with OFCCP requirements if they also serve to establish compliance with our EEO Rule. OFCCP compliance, however, does not necessarily establish EEO compliance for our purposes.

77. We also found NAB's proposal to base compliance on the NASBA (BEDA) model program inadequate.¹³⁸ The NASBA model plan consists of a series of suggestions that individual state broadcast associations can use to develop programs for their states. However, individual associations are not required to follow the suggestions in the plan. Thus, the actual components of particular state association plans will vary. As we previously concluded, the existence of different requirements in different states would be confusing to the public and difficult to enforce. There also is no assurance that plans adopted by each state association will achieve our EEO goals. Moreover, we are concerned that some state associations could incorporate into their plans requirements that would be inconsistent with the Court's rulings in *Lutheran Church and/or Association*. For us to incorporate such requirements by reference into our own EEO requirements could raise legal or constitutional questions.

78. NAB's third option, its own plan, requires only non-vacancy-specific general outreach initiatives (comparable to our Prong 3 menu options) without recruiting for a single vacancy. Although general outreach initiatives have value, we do not agree that they can serve as an adequate substitute for vacancy-specific recruitment. Indeed, the general outreach initiatives in Prong 3 are designed to alert interested persons to employment opportunities in broadcasting and to enable them to acquire necessary skills. The value of such efforts would be seriously impaired if such persons were thereafter deprived of notice of actual vacancies for which they might apply. We accordingly do not find the NAB plan to be a credible substitute for vacancy-specific recruitment.

79. Unlike NAB's proposal, which could be satisfied without any vacancy-specific recruitment, StBAs has submitted a proposal that would require recruitment by means of the Internet for at least 50 percent of a station's full-time vacancies, subject to a further exemption for exigent circumstances.¹³⁹ We are unable to accept a proposal that exempts a certain percentage of jobs from the recruitment requirement because that could result in the most desirable jobs being filled without public recruitment. We will discuss StBAs' proposal relating to the use of the Internet below.

80. In the *Second NPRM*, we recognized that there might be occasional exigent circumstances in which recruitment may not be feasible.¹⁴⁰ We cited as an example the need to replace immediately an employee who departs without notice and whose duties cannot be fulfilled, even briefly, by other station employees. We stated, however, in the *Report and Order* that we could not anticipate every circumstance which might justify filling a position without recruitment and indicated that we would rely on the good faith discretion of broadcasters. We nonetheless cautioned that we expected nonrecruited vacancies to be rare relative to the number of vacancies for which recruitment is conducted, because our Rule generally requires recruitment for every vacancy.¹⁴¹ We will incorporate this approach in our new rules.

¹³⁸ *Report and Order*, ¶ 91, 15 FCC Rcd at 2370.

¹³⁹ StBAs Comments at 54. Forty-six of the Named State Broadcast Associations submitted a similar proposal in response to the *1998 NPRM*; the plan at that time contemplated that stations would recruit for at least 67 percent of their full-time vacancies. *Report and Order*, ¶ 82, 15 FCC Rcd at 2367.

¹⁴⁰ *Second NPRM*, ¶ 25, 16 FCC Rcd at 22851.

¹⁴¹ *Report and Order*, ¶ 89, 15 FCC Rcd at 2369.

81. NAB suggests that we should further clarify the circumstances in which this exigent circumstances exception applies because uncertainty in this respect could trigger allegations that a station violated the EEO Rule.¹⁴² We are unable to anticipate every circumstance in which the exigent circumstances exception might apply because it is intended to respond to emergency circumstances that are difficult to anticipate. Moreover, the applicability of the exemption may vary based on the station. Finally, the best method for defining the scope of the exigent circumstances policy is through experience based on actual cases rather than hypothetical circumstances.

82. NAB also cites the need for confidentiality in some circumstances so as not to alert an existing employee, whom the broadcaster is seeking to replace, or competitors as to its plans. In appropriate circumstances, such a situation could provide sufficient justification for a departure from the normal recruitment procedures. There are, however, recruitment sources and techniques (such as blind advertisements) that can sometimes be used to achieve a significant degree of outreach while preserving confidentiality.

83. In applying the exigent circumstances exception, we will look to the entirety of the licensee's recruitment efforts in assessing its compliance with our Rule. Our primary concern is that the licensee not abuse the exigent circumstances exception as a means of avoiding regular recruitment. In the absence of evidence of such abuse, we would not necessarily find a violation even if we disagreed with a licensee's decision as to a particular hire, as long as it is made in good faith.

84. NAB urges that we should create an exemption from our recruitment requirement for "unique" jobs, including on-air talent and general managers.¹⁴³ In some instances, the unique nature of a particular position and the need to proceed promptly to fill it may qualify as an exigent circumstance that would warrant a decision not to recruit. We will not, however, exempt whole categories of jobs from recruitment because the exigency may not exist in all circumstances. NAB also urges that we should create an exemption where it is futile to recruit. It cites as an example the case of a station seeking to hire a chief engineer or meteorologist when there is no reasonable likelihood that a qualified person would be found from an advertisement in the local newspaper.¹⁴⁴ It also suggests that there should be no requirement to conduct additional recruitment when a station has accumulated a number of resumes from qualified persons at job fairs.¹⁴⁵ These concerns are not appropriately addressed in the context of an exemption from the recruitment requirement, however, because they relate to the manner in which recruitment is conducted, which we discuss below.

85. NAB suggests also that recruitment should not be required when a broadcaster has already identified a "preferred person" for a position sought to be filled. We would, in rare circumstances, recognize as an exigent circumstance the availability of a talent so unique and exceptional that a broadcaster could reasonably conclude that a comparable talent is unlikely to be found by recruitment. This would not, however, extend to all circumstances in which a broadcaster, without recruitment, has identified a "preferred" candidate because that would make recruitment effectively optional, especially for the best jobs.

¹⁴² NAB Comments at 46-47.

¹⁴³ *Id.* at 47-49.

¹⁴⁴ *Id.* at 49.

¹⁴⁵ *Id.* at 50.

86. Accordingly, the requirement that broadcasters recruit for every full-time vacancy, unless exigent circumstances exist, will become a component of our Rule. Recruitment for only some openings could leave the most desirable positions open to a limited number of potential applicants, possibly excluding significant segments of the community.¹⁴⁶ We will require that broadcasters develop and use for each vacancy a recruitment source or list of recruitment sources (which may be freely modified as circumstances warrant) sufficient to ensure wide dissemination of information about the opening.¹⁴⁷ We will not dictate the number or type of sources that a broadcaster must use. If, however, the source or sources used cannot reasonably be expected, collectively, to reach the entire community, the broadcaster may be found in noncompliance with our EEO Rule. A broadcaster may widely disseminate job postings through any combination of methods sufficient to ensure that its recruitment efforts are inclusive. Broadcasters may contact the FCC's EEO staff with any questions on this matter.

87. We also clarify that the same recruitment sources need not be used for every hire. We recognize that different positions may require different qualifications, as noted by NAB with respect to the positions of chief engineer or meteorologist. Accordingly, different recruitment sources may be appropriate to reach persons in the community likely to possess the requisite qualifications for such positions. We do not require licensees to use recruitment sources that, in their good faith judgment, are unlikely to elicit responses from qualified applicants in light of the demands of a particular job. Licensees are not required, for example, to place a job notice in the local newspaper if they do not believe in a particular situation that the newspaper would be likely to reach qualified applicants. We do expect them, however, to use whatever recruitment source or sources can reasonably be expected to widely disseminate notice of the vacancy to qualified applicants.

88. Although our Rule seeks to achieve broad outreach to the community, this does not preclude the use of regional or national recruitment sources. Such sources also promote the wide dissemination of information concerning employment opportunities. We will accordingly give consideration to a broadcaster's use of such sources in assessing its EEO record.¹⁴⁸ Moreover, in the case of the chief engineer or meteorologist type of positions noted by NAB, a source from outside the community, such as a national publication directed to engineers, might be an effective method of communicating the availability of the position to persons located within the community. For example, someone in a station's local community who has the unique qualifications to be a meteorologist may rely almost entirely on national sources to search for meteorologist jobs in broadcasting. Whatever sources a licensee uses, however, or whatever a licensee's perception is regarding whether anyone in its community is qualified for a unique job, we are requiring that sources reach qualified potential applicants in the licensee's community. Licensees are not permitted to target any group in the community for exclusion from the recruitment process.

89. We further emphasize that our Rule requires only that the recruitment source or sources used be reasonably calculated to reach the entire community. It does not require that a broadcaster be able to demonstrate that people in any particular segment of the community actually were aware of the

¹⁴⁶ *Report and Order*, ¶ 85, 15 FCC Rcd at 2368.

¹⁴⁷ *Id.* For example, if a broadcaster placed advertisements for a general manager position in a widely circulated local newspaper every day for a week, we would consider this recruiting effort to be sufficient to ensure wide dissemination reasonably calculated to reach the entire community. We offer this example merely to provide guidance; it does not establish a specific benchmark to meet.

¹⁴⁸ *Recon*, ¶ 71, 15 FCC Rcd at 22568.

vacancy or applied for the position. Contrary to concerns expressed by some,¹⁴⁹ we do not require that recruitment be targeted to specific groups in the community, or that a licensee demonstrate that it obtained a response from a particular group. Furthermore, in assessing the adequacy of their recruitment sources, broadcasters may assume that persons seeking jobs will make some effort to seek out job opportunities in publicly available resources.

90. NAB proposes that broadcasters should be allowed to recruit for such positions as salespersons solely on the basis of resumes received at job fairs. Non-vacancy-specific recruitment is not, however, an adequate substitute for recruitment when vacancies arise. We have permitted broadcasters to rely upon reasonably current applications on file, however, where the applications were the product of a vacancy-specific recruitment conducted in accordance with our Rule. In *MyStar Communications Corporation*, for example, we found that applications elicited three months prior to the hire at issue were not necessarily stale.¹⁵⁰ For purposes of our present rule, we will apply a similar policy. Thus, if a broadcaster recruits in accordance with our present vacancy-specific broad outreach requirement, and in its judgment the applications received remain viable at a later date, it may make additional hires for substantially the same position originally advertised from that pool without initiating a new recruitment process. In addition, it may consider along with the previously submitted applications additional applications received at job fairs or through other non-vacancy-specific efforts.

91. MMTC requests that we clarify that, although not required, our Rule permits the use of recruitment sources targeted to minorities or females.¹⁵¹ Our Rule neither requires nor precludes the use of any specific sources a broadcaster deems appropriate to achieving broad outreach. MMTC's concern arises from language in *Association* suggesting that the use of minority-targeted sources might disadvantage non-minorities by depriving them of notice. MMTC suggests that some have construed this as meaning that the use of minority-targeted sources would constitute unlawful discrimination. We do not believe this would be true if a broadcaster were using recruitment sources sufficient to achieve broad outreach.

92. With reference to the definition of community for purposes of the broad outreach requirement, we proposed in the *Second NPRM* to define "community" as encompassing, at a minimum, the county in which a station is licensed or MVPD employees are primarily located, or the Metropolitan Statistical Area ("MSA") in the case of counties located in an MSA.¹⁵² NAB objects to this definition because counties and MSAs do not necessarily reflect a station's actual service area.¹⁵³ Upon further reflection, we agree. We will instead define "community" for the purpose of the broad outreach requirement in accordance with the approach taken in the *Recon*. There, we left the definition of "market" or "community" to the licensee's good faith discretion. We indicated, however, that, in making this determination, a broadcaster should assess the technical coverage of its station(s); its marketing, promotional, and advertising practices; the pertinent market definitions adopted by public agencies or

¹⁴⁹ StBAs Comments at p. 51-53; NAB Comments at 39; The Local Television Group Comments at 13-20.

¹⁵⁰ *MyStar Communications Corporation*, 12 FCC Rcd 5239, 5244 (1997).

¹⁵¹ MMTC Comments at 79-84.

¹⁵² *Second NPRM*, ¶ 23, 16 FCC Rcd at 22850.

¹⁵³ NAB Comments at 43-44.

commercial services, such as Nielsen and Arbitron; and requests for notices of job vacancies from locally-based community groups.¹⁵⁴ We will adopt the same policy for purposes of our new Rule.¹⁵⁵

93. LTVG argues that a rule not adequately explained is an arbitrary rule and that the Commission has not adequately explained its EEO Rule.¹⁵⁶ For example, LTVG claims that the Commission has not explained what it means when it directs broadcasters to reach out to all segments of the entire community under Prong 1 of the EEO Rule. LTVG asserts that it is impossible for broadcasters to reach out to every segment in the entire community whenever a job in broadcasting becomes available because there are an infinite number of segments, including “occupational segments, ideological segments, sociological segments, historical segments, recreational segments, political segments, philosophical segments, economic segments and so on.”¹⁵⁷ In addition, LTVG argues that the language of Prong 1 is unclear and therefore it interprets Prong 1 as meaning “that a broadcaster is not ‘required’ to use recruitment sources specifically targeted at minorities and women, but only if it can demonstrate that it employs some alternate method of ‘reaching out’ to minorities and women.”¹⁵⁸ LTVG also argues that the Commission has not explained why multiple recruitment sources must be used in providing notice of job openings. LTVG further argues that Prong 1 provides no meaningful exception for “urgent hire” or other situations where recruitment is not feasible. In addition, LTVG argues that the Commission’s “logical premise that ‘fairness’ is not possible without the proposed ‘outreach’ rules is plainly invalid” because Prong 1 requires detailed and burdensome outreach.¹⁵⁹

94. As discussed above, under Prong 1 of our EEO Rule, we require only that EEO recruitment sources be reasonably calculated to reach the entire community. We do not require that broadcasters demonstrate that any particular segment of the community actually was aware of any vacancy. Nor do we require that recruitment be targeted to a specific segment or that broadcasters prove that they obtained a response from a particular segment. Prong 1 neither requires nor precludes the use of any number or type of sources a broadcaster deems appropriate to achieve broad outreach. Further, we leave the definition of “community” to the licensee’s good faith discretion. We also recognize that it is difficult for licensees to recruit for vacancies in exigent circumstances. Thus, Prong 1 allows broadcasters flexibility in implementing appropriate recruitment programs for their individual circumstances.

95. As indicated above, StBAs has proposed that we should deem posting of job vacancies on the Internet as constituting adequate recruitment. We addressed a similar proposal in the *Report and Order*.¹⁶⁰ At that time, we expressed our concern as to the use of the Internet as a sole recruitment source

¹⁵⁴ *Recon*, ¶ 68, 15 FCC Rcd at 22567.

¹⁵⁵ Although we are according discretion regarding the definition of “community,” we expect broadcasters to be able to provide a reasonable explanation for their determinations should it become pertinent. Thus, we would be concerned if the circumstances suggested that a broadcaster is unreasonably defining its community in a manner that excludes certain areas or populations that it clearly does serve.

¹⁵⁶ LTVG Comments at 18; Radio Licensees Comments at 2.

¹⁵⁷ LTVG Comments at 14.

¹⁵⁸ LTVG Comments at 18.

¹⁵⁹ LTVG Comments at 18-20.

¹⁶⁰ *Report and Order*, ¶ 86-87, 15 FCC Rcd at 2368-69.

based on the developmental state of broadcast association job banks and the possibility that Internet-only recruitment would disproportionately disadvantage minorities and those living in rural areas. We questioned whether industry web sites had become well known as repositories of job announcements for prospective applicants. We also questioned whether the availability of Internet access in schools and libraries provided a widespread mechanism for prospective applicants otherwise without Internet access to conduct job searches. We thus concluded that it was premature to recognize the Internet as a sole recruitment source, although we indicated that we would monitor the development of the Internet as a recruitment tool. We indicated that we would revisit the issue based on petitions demonstrating that Internet job banks (1) are well established and provides comprehensive statewide job listings; (2) are sufficiently publicized throughout the community; (3) are available to stations that are not members of the association sponsoring the Internet job bank to list their job vacancies; and (4) that computer access has become sufficiently universal so that it could be reliably assumed that an Internet job posting will be readily available to all segments of the community. Finally, we said we would review the extent to which applicants are applying for jobs as a result of web postings, whether and why any segment of the community is having particular difficulty in gaining access to such postings, and methods by which the petitioner would reach that segment of the population. In the *Second NPRM*, we requested comments as to whether we should revisit this issue.

96. The record reflects that NASBA and NAB now maintain national on-line job sites, as do almost all state broadcast associations.¹⁶¹ With respect to the MVPD industry, NCTA states that online job banks are maintained by the Walter Kaitz Foundation, which NCTA describes as the industry's diversity-focused organization, and the National Association of Minorities in Telecommunications (NAMIC), a trade association.¹⁶² Cox Communications, Inc. ("Cox"), which states that it provides MVPD services to more than six million subscribers, reports that, in 1999, it created an Internet career network to alert its employees and the general public in the communities in which it operates, as well as other areas of the country, of job vacancies at all levels of its operations. Cox indicates that its experience with the Internet career network has been quite positive.¹⁶³

97. Notwithstanding the greater availability of job-related Internet sites, the record does not reflect the extent to which the Internet has become well known as a principal resource for job seekers or the nature of any difficulties that Internet recruitment would create. We anticipated in the *Report and Order* that we would be able to assess the extent of any such difficulties based on our experience under the rules adopted therein. Because those rules were in effect for only a few months, however, we do not have the experience necessary to reach definitive conclusions in that respect.

98. With regard to the access of minority and rural populations to the Internet, our concerns arose from a series of reports by the National Telecommunications and Information Administration ("NTIA") in 1995, 1998 and 1999.¹⁶⁴ The most recent NTIA report on Internet usage was released in February 2002.¹⁶⁵ The 2002 NTIA report finds that, as of September 2001, 56.5 percent of U.S. households had a computer and 50.5 percent of U.S. households had an Internet connection. As of September 2001,

¹⁶¹ NAB Comments at p. 5; StBAs Comments at 22-23.

¹⁶² NCTA Comments at 10=11.

¹⁶³ Cox Comments.

¹⁶⁴ *Report and Order*, 15 FCC Rcd at 2368 n. 174.

¹⁶⁵ National Telecommunications and Information Administration, "A Nation Online: How Americans are Expanding Their Use of the Internet" (February 2002) ("NTIA Study").

53.9 percent of individuals were using the Internet, compared with 44.5 percent in August 2000. Use of the Internet by people in rural households has grown by 24 percent over the period from 1998 to 2001 and now approaches the national average. Internet use by Blacks reached 39.8 percent in September 2001, up from 29.3 percent in August 2000 and 19.0 percent in December 1998. Internet use by Hispanics reached 31.6 percent in September 2001, up from 23.7 percent in August 2000 and 16.6 percent in December 1998. Internet use by Whites reached 59.9 percent in September 2001, up from 50.3 percent in August 2000 and 37.6 percent in December 1998. Internet usage by Asian/Pacific Islanders reached 60.4 percent in September 2001, up from 49.4 percent in August 2000 and 35.8 percent in December 1998.¹⁶⁶ Internet use by persons in the lowest income group (less than \$15,000 per year) reached 25 percent in September 2001, up from 18.9 percent in August 2000 and 13.7 percent in December 1998.

99. Proponents of the use of the Internet as a sole recruitment source cite the improvements reflected in NTIA's 2002 report.¹⁶⁷ Opponents of reliance on the Internet as a sole source note that there remain disparities in the use of the Internet.¹⁶⁸ Although the NTIA 2002 report shows increases in Internet usage, the report also indicates continuing disparities in usage among different segments of society. Indeed, only about half of all U.S. households had Internet service as of September 2001, and only slightly more than half of individuals used the Internet from any location.¹⁶⁹ Accordingly, we are unable to conclude that Internet usage has become sufficiently widespread to justify allowing it to be used as the sole recruitment source. As we indicated in the *Report and Order*, however, we will continue to monitor the viability of the Internet as a recruitment source and will consider petitions seeking to demonstrate in the future that circumstances have changed sufficiently to warrant a change in our policy.

100. As indicated in the *Report and Order*,¹⁷⁰ we expect broadcasters to allow a reasonable time after recruitment is initiated for applications to be filed before the position is filled. We recognize that occasionally a shorter time might be necessary because of extraordinary circumstances. We caution, however, that excessive instances of hires being made shortly after the initiation of recruitment could result in a finding of noncompliance if the evidence suggests that the broadcaster is not in good faith allowing adequate time for applicants to respond to its outreach efforts or is not considering their applications. MMTC suggests that we should adopt specific requirements regarding the timing of recruitment and accompanying record-keeping requirements to prevent pre-selection of the successful candidate.¹⁷¹ Such requirements would add burdens that would not necessarily achieve the desired end. We caution broadcasters and MVPDs, however, that evidence that an entity has pre-selected a successful candidate without considering the applications of other applicants will be considered in evaluating compliance with our Rule.

¹⁶⁶ The NTIA statistics did not provide comparable statistics on Internet usage by American Indians/Alaskan natives.

¹⁶⁷ See, e.g., NAB Comments at 40-41; StBAs Comments at 43.

¹⁶⁸ See, e.g., MMTC Comments at 112-13; NOW Comments at 6; AWRT Comments at 11; and AFTRA Comments ¶ 32.

¹⁶⁹ NTIA Study at Table 2-2.

¹⁷⁰ *Report and Order*, ¶ 90, 15 FCC Rcd at 2369

¹⁷¹ MMTC Comments at 73-74, 145.

101. MMTC also suggests that broadcasters and MVPDs should certify that they do not rely primarily on word of mouth recruitment.¹⁷² Such a certification is not necessary because we require broad outreach in filling all full-time vacancies, except for rare exigent circumstances. It is not the intention of our Rule to prohibit word of mouth recruitment. Our purpose is to ensure that word-of-mouth recruitment practices are not the sole method of recruitment and that all members of the public have an opportunity to compete for available jobs. Broadcasters are free to use non-public recruitment sources and to interview and hire persons referred by such sources, so long as they also use public recruitment sources sufficient to achieve broad outreach and fairly consider the applications generated by those sources.

102. We will continue our policy stated in the *Report and Order* that broadcasters may engage in joint recruitment efforts.¹⁷³ Broadcasters may also rely upon the services of outside organizations or individuals to assist it in designing or implementing their recruitment efforts.¹⁷⁴ Each broadcaster (or MVPD), however, remains individually responsible for compliance with our Rule. No broadcaster (or MVPD) is required to use the services of an outside party.

103. We will not require recruitment for internal promotions, nor will we require recruitment for temporary employees. Typically, we view temporary employees as including those hired as emergency replacements for absent regular employees or those hired to perform a particular job for a limited period of time. If a person is hired full-time to perform a regular station function for an extended period of time (e.g., more than six months), however, such a hire will be treated as a permanent hire for which recruitment would be required. We recognize that some broadcasters may wish to hire employees initially on a temporary basis with the possibility of retaining them on a permanent basis if their performance is satisfactory. In such circumstances, if recruitment is done at the time of the temporary hire, any later decision to convert the employee's status to full-time in the same, or essentially the same, job may be treated as a promotion. If an employee is hired as a temporary employee without recruitment, however, recruitment should occur if the employee is later considered for a permanent position. We caution that excessive instances of temporary hires being converted to permanent hires, without a meaningful opportunity for recruited applicants to compete, could result in a finding of noncompliance.¹⁷⁵

104. With respect to part-time hires, under our pre-*Lutheran Church* EEO Rule, we expected broadcasters to recruit for part-time positions but did not focus on part-time hires in our review of EEO programs.¹⁷⁶ We retained this policy in the *Report and Order*.¹⁷⁷ Thus, we provided in the Rule we adopted at that time that, for part-time hires, broadcasters need only substantially comply with the requirement to recruit for every vacancy. AWRT urges that we should apply the same recruitment

¹⁷² MMTC Comments at 72-73.

¹⁷³ *Report and Order*, ¶ 88, 15 FCC Rcd at 2369.

¹⁷⁴ *Recon*, 15 FCC Rcd at 22563 n. 48. See also StBAs Comments at 54-55; Comments of Broadcast Compliance Services.

¹⁷⁵ If an employee is hired with the expectation that successful completion of an initial probation will result in an eventual elevation to permanent status, we would not regard that as a temporary hire and would expect regular recruitment for that position.

¹⁷⁶ See, e.g., *WFSQ (FM)*, 7 FCC Rcd 6045, 6046 (1992); *Enterprise Media of Toledo, L.P.*, 12 FCC Rcd 3920, 3923-24 (1997).

¹⁷⁷ *Report and Order*, ¶ 110, 15 FCC Rcd at 2375-76.

requirement to part-time vacancies as is applied to full-time vacancies, citing the value of part-time positions in providing entry into broadcasting.¹⁷⁸ We agree that some positions involving less than a forty-hour work week are as important as full-time positions. For that reason, we will continue to define "full-time employee" as a permanent employee whose regular work schedule is thirty hours or more per week. Thus, the full recruitment and reporting requirements applied to full-time employees will cover all of these positions. For those positions involving less than thirty hours per week, however, we do not find that the record before us adequately addresses the issue of whether all or some of our recruitment requirements should apply to such employees. We are accordingly issuing below a Third Notice of Proposed Rule Making requesting comment on the issue of part-time employees. Pending the outcome of that further rulemaking, we will not apply our rules to part-time hires.

105. In the *Recon*, we indicated that, as in the case of temporary hires, if a part-time employee is initially hired after broad outreach to all segments of the community, the decision subsequently to convert him or her to full-time in the same, or essentially the same, job may be treated as a promotion. If the broadcaster did not engage in full recruitment at the time of the initial part-time hire, however, it would have to recruit before converting the employee to full-time. Also, as in the case of temporary hires, excessive instances of temporary hires being converted to permanent hires without a meaningful opportunity for recruited applicants to compete could result in a finding of noncompliance.¹⁷⁹ We will apply the same policy under the Rule being adopted today.

106. **Outreach Prong 2 – Notification to Community Groups.** Under the Option A rules adopted in the *Report and Order*, we required that broadcasters and MVPDs provide notification of full-time job vacancies to organizations involved in assisting job seekers upon request by such organizations. We will incorporate this requirement into our new rules. This requirement provides a "safety valve" to ensure that no segment of the community is inadvertently omitted from recruitment efforts. Organizations or other entities with ties to specific segments of the labor force, such as persons with disabilities, college students, or members of different racial, ethnic, or religious groups could help broaden the reach of recruitment efforts. Organizations that come forward to request vacancy notifications may prove to be very productive referral sources. Further, this approach will enable interested groups to more closely monitor and, if necessary, seek to improve, broadcasters' recruitment efforts.¹⁸⁰ We also expect broadcasters to make reasonable efforts to publicize the notification requirements so that qualifying groups are able to learn of the new procedure. Joint announcements by broadcasters or state broadcasters' associations – such as press releases, newspaper ads, and notices posted on the web site – would satisfy the requirement to publicize. Similarly, broadcasters and MVPDs could satisfy this requirement by individually issuing such announcements, or by providing on-air announcements.

107. We will provide broadcasters discretion to determine the method of providing notice to requesting parties. Such methods may include electronic mail and facsimile which may require fewer personnel and financial resources to fulfill the notification requirement than more traditional methods. For example, a broadcaster may maintain an electronic list of recruitment sources and notify all the sources simultaneously with a single e-mail when a vacancy occurs. We will also allow notifications to

¹⁷⁸ AWRT Comments at 9-11; *see also* NOW Comments at 8-10.

¹⁷⁹ *Recon*, ¶ 67, 15 FCC Rcd at 22567.

¹⁸⁰ StBAs Comments at 54. (StBAs supported retention of this requirement in the context of its recruitment proposal.)

be made as part of joint recruitment efforts among broadcasters. However, each broadcaster participating in the joint recruitment efforts remains individually responsible for ensuring that requested notifications relating to its employment unit are made. For example, a state broadcast association may have a job bank that notifies certain sources on behalf of an employment unit when a vacancy becomes available at that employment unit. As long as the state broadcast association notifies all organizations requesting vacancy announcements from that employment unit as part of this process, the employment unit itself need not do so. Therefore, given the flexibility provided by electronic forms of notice and joint recruitment, we expect that the notification requirement will place minimal burdens on broadcasters.

108. An organization that wishes to be notified of vacancies need only notify a broadcaster once in order to be entitled to notification of all future full-time vacancies. However, if a broadcaster is uncertain as to the status or continuing interest of a particular group, it is free to contact the group to resolve any questions. So long as the group indicates its continued interest in receiving notifications, it is entitled to receive them.

109. The obligation to notify recruitment sources that request notice of vacancies is intended as a supplement to, not a substitute for, broadcasters' core, non-delegable obligation to widely disseminate information concerning all job vacancies. Although recruitment sources will have the right to ask broadcasters for notices of vacancies, they have no obligation to do so. And even if a broadcaster does not receive a single request for notice of vacancy information, it will nevertheless be responsible for ensuring that notice of vacancies is widely disseminated. If it fails to do so, it is not a legitimate excuse that no recruitment organizations requested notices.

110. The requirement to send job notices to qualifying entities requesting vacancy announcements sets no limit on the number of entities that may request notifications. The Local Television Group ("LTVG") argues that this could potentially result in hundreds of entities requesting notifications and unwieldy burdens being imposed on a licensee, and is therefore arbitrary and capricious.¹⁸¹ It is not our intention to make this requirement unreasonable or unmanageable. During the period that this requirement, which was adopted in the *Report and Order*, was in effect in 2000 and 2001, the Commission received no information indicating that it was burdensome. Furthermore, no new evidence has been presented in this proceeding indicating that licensees were overly burdened by the requirement when it was in effect. Based on the record, there does not appear to be a need to set maximum limits on the number of notification requests. If, however, we receive evidence that this requirement imposed an excessive burden, we will revisit this issue.

111. LTVG also argues that the Commission's assertion that "the expansive 'Prong 2' 'safety valve' requirement is also necessary appears to be inadequately explained, and therefore arbitrary."¹⁸² It further alleges that Prong 2 appears to be arbitrary because it would "effectively delegate to private entities the authority to require what the FCC itself states the proposed 'outreach' rules are not intended to require: 'the use of recruitment sources that are specifically targeted at minorities, women or any other group.'"¹⁸³

¹⁸¹ LTVG Comments at 20-22.

¹⁸² LTVG Comments at 20-21.

¹⁸³ LTVG Comments at 22.

112. Prong 2 of the EEO Rule requires broadcasters and MVPDs to provide requested notification of full-time job vacancies to organizations involved in assisting job seekers, regardless of whether they are minority or women's organizations. As explained above, the notification requirement provides a "safety valve" to ensure that no segment of the community is inadvertently omitted from recruitment efforts. This neutral requirement allows community groups to become actively involved in broadening the outreach of recruitment efforts. Contrary to LTVG's arguments, this requirement increases inclusiveness in sources and does not exclude any segment.

113. **Outreach Prong 3 – Menu Options.** Under the Rules adopted by the *Report and Order*, we required, under Option A, that broadcasters and MVPDs engage in a specified number of activities selected from a menu of options, such as job fairs, community events relating to broadcast employment, internship programs, scholarships, and similar activities. These activities are designed to go beyond the normal recruitment activities directed at filling particular vacancies. They are designed to encourage outreach to persons who may not be aware of the opportunities available in broadcasting or the MVPD industry or have not yet acquired the experience to compete for current vacancies. Thus, interested members of the community will not only have access to information concerning specific job vacancies, but also will be encouraged to develop the knowledge and skills to pursue them. This approach remains justified and is not unduly burdensome. Various menu options encourage outreach to students and others who would benefit from training, mentoring and scholarships, which can work to enhance the employability of persons seeking jobs in the broadcasting or MVPD industries. These menu methods of outreach also are designed to further broaden outreach efforts to reach segments of the labor force who may be inadvertently omitted from vacancy-specific recruitment. As indicated above, under this approach, broadcasters and MVPDs have great flexibility to design the types of recruitment activities best suited to their organizations and communities. In the Rule we are adopting today, we will adopt this requirement while providing additional flexibility by incorporating additional menu options that have been suggested by the parties. We are also reducing the number of menu options that employment units located in smaller markets must perform.

114. The first three specific menu options include participation in at least four job fairs by station personnel who have substantial responsibility for hiring decisions; hosting at least one job fair; or co-sponsoring at least one job fair with an organization in the business and professional community whose membership includes substantial participation of women and minorities. Job fairs are a useful method to reach a broad range of individuals who are interested in employment in the industry. The fourth option is participation in at least four activities sponsored by community groups active in broadcast employment issues, including conventions, career days, workshops and similar activities. Such participation will enable broadcasters to establish relationships with groups in the community that might otherwise be overlooked. The fifth option is the establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment. Such an endeavor would serve the goal of broad outreach by increasing the number of qualified potential employees not only for one broadcaster, but for all broadcasters in the area. The sixth option is participation in general (as opposed to vacancy-specific) outreach efforts by such means as job banks or Internet programs such as those described in the model program developed by NASBA. While such sources may be used as recruitment sources when specific vacancies occur, they can also be useful even when there is no specific vacancy to elicit interest from persons who may later be considered for a specific position. The seventh option is participation in scholarship programs directed to students desiring to pursue a career in broadcasting. The benefit of this outreach is that it attracts students of both genders and all races to careers in broadcasting, ultimately increasing the number of qualified potential employees. The eighth and ninth options are, respectively, the establishment of training and mentoring programs designed to enable station personnel to acquire skills that could qualify them for higher level positions. These options

would not be satisfied by ordinary training required for employees to perform their current positions. These options are rather intended to increase employee skills so they can qualify for higher positions.

115. The tenth option is participation in at least four events or programs relating to career opportunities in broadcasting sponsored by educational institutions. Such participation again serves the purpose of increasing the universe of potential employees from which broadcasters attract job applicants. For instance, it is stated in the NASBA program submitted as an attachment to StBAs' comments that it is important that educational institutions perceive broadcasting as a rewarding career for their students and offer courses and experiences that will be helpful to students who may choose a career in broadcasting.¹⁸⁴ The eleventh option includes sponsorship of at least two events in the community designed to inform the public as to employment opportunities in broadcasting. Such activities can serve to increase public awareness of the opportunities available in broadcasting. The twelfth option would entail listing each upper-level opening in a job bank or newsletter of a media trade group with a broad-based membership, including participation of women and minorities.

116. We propose to add to the specific menu options some new ideas proposed by commenters. The thirteenth option will consist of providing assistance to outside non-profit entities in the maintenance of web sites that provide counseling on the process of searching for broadcast employment and/or other career development assistance pertinent to broadcasting. The fourteenth option consists of providing training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination. The fifteenth option consists of providing training to personnel of outside recruitment organizations that would enable them to better refer job candidates for broadcast positions.¹⁸⁵

117. The sixteenth option (which was the thirteenth option in our former Rule) includes participation in activities other than the fifteen listed options that the licensee has designed to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. This will provide flexibility for worthwhile initiatives that broadcasters may develop but that are not strictly within the scope of the menu options we have specified. The inclusion of this option makes it clear that the list of menu options is an open-ended list intended to guide, rather than limit, broadcasters and MVPDs.

118. NOW urges that we should clarify and quantify the amount of effort that broadcasters must devote to the menu options.¹⁸⁶ We decline to do so because any quantification we might provide would unduly restrict needed flexibility. We caution, however, that token efforts will be found inadequate.

119. In the *Report and Order*, we required station employment units with more than ten full-time employees to implement four of these options every two years. For example, a broadcaster could fulfill this requirement by, during a two-year period, hosting one job fair, establishing an internship program, participating in a scholarship program, and co-sponsoring one job fair with an organization in the business and professional community whose membership includes participation of minorities and

¹⁸⁴ 46 Named StBAs Comments at Exhibit 1, p. 2.

¹⁸⁵ MMTC Comments at 116-19; AFTRA Comments ¶ 35; statement of Charles Warfield, President and Chief Operating Officer of ICBC Broadcast Holdings, June 24, 2002, EEO *En Banc* Hearing, Tr. 102.

¹⁸⁶ NOW Comments at 11-13.

women.¹⁸⁷ This requirement will be incorporated into our new Rule. The two-year period will generally extend from the time a licensee files its renewal application to the second, then fourth, and then sixth anniversary thereof. Initially, it will extend from the effective date of the Rule until the next pertinent anniversary. If that time period is less than two years, the number of menu options may be reduced proportionally to the amount of time available. Thus, if a station is required generally to perform four menu options every two years, it would be expected to perform one for each six-month period between the effective date of the Rule and the next regular pertinent anniversary. Although we ordinarily do not dictate when a broadcaster must complete its menu options during the regular two-year period, when a broadcaster owns a station or stations for less than the full two-year period, it must complete the prorated number of menu options within the available time period. As discussed below, we will require employment units with five to ten full-time employees as well as employment units in certain smaller markets to perform two of the menu options every two years.

120. We will also permit broadcasters to perform menu options on a joint basis, either with other broadcasters, organizations such as state broadcaster associations, or with a corporate licensee's corporate headquarters. However, a station seeking credit for a particular menu option performed on a joint basis must have a meaningful involvement in the activity for which credit is sought. It is not sufficient for the station merely to lend its name to an activity or provide money where the activity is otherwise entirely conducted by another entity such as a trade association or the licensee's corporate headquarters. In the *Recon*, we discussed a number of circumstances where credit might be sought for activities engaged in on a joint basis.¹⁸⁸ This discussion remains applicable to joint efforts engaged in pursuant to the rules we are adopting herein, and are discussed below.

121. For example, with respect to the hosting of job fairs, this option could be performed on a joint basis, subject to the qualification that each broadcaster must participate in a meaningful way in the planning and implementation of the event. Insofar as a particular broadcaster's participation amounts to little more than attendance at the job fair, then it can only claim credit for such attendance, even if it has been nominally designated a cosponsor.

122. We note that the term "sponsor" as used in connection with several options set forth in Section 73.2080(c)(2) of the old Rule, which we also use in our new Rule, was apparently misunderstood by some as referring only to a financial contribution. Our intent for the purpose of these options is that a "sponsor" should have a meaningful input into the planning and implementation of a specified event. Simply lending one's name or making a monetary contribution would not be sufficient. Events can be jointly sponsored, so long as each broadcaster seeking credit for sponsoring the event is actively involved in planning and implementing the event.

123. With respect to the maintenance of a scholarship program by a corporate licensee, it is reasonable for a corporate licensee to maintain a scholarship program for those employment units it owns. Any such scholarship program, however, should incorporate involvement by the employment units for which credit will be claimed in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. While each employment unit need not be involved in every aspect of the program, meaningful involvement in the program is essential to ensure that the employment unit is fulfilling its responsibility under our Rule. In addition, the number of employment

¹⁸⁷ *Report and Order*, ¶ 103, 15 FCC Rcd at 2373.

¹⁸⁸ *Recon*, ¶ 56-60, 15 FCC Rcd at 22564-65.

units seeking credit for a scholarship program should bear a reasonable relationship to the number or type of scholarships awarded by the corporate licensee.

124. Unrelated broadcasters may also jointly maintain a scholarship program, which could be done through a state or local broadcast association, including efforts by such associations to coordinate regional efforts. Again, however, we believe that the program should incorporate meaningful involvement by each broadcaster seeking credit for the initiative in such areas as the design of the program, the solicitation of prospective scholarship recipients, the interviewing and selection of scholarship recipients, on-air promotion of the program, and evaluation of the effectiveness of the program. As in the case of corporate scholarship programs, the number or type of scholarships awarded by the joint scholarship program would have to bear a reasonable relationship to the number of employment units seeking credit for it.

125. With respect to mentoring, internships, or training programs administered by a corporate licensee, employment units of the licensee could claim credit for such a program even if not implemented in the community where the employment unit is located, but only so long as personnel from the employment units are participants in the mentoring, internships or training program. Similar questions arose under our former Rule as to job fairs hosted by a corporate licensee. We would credit individual employment units with cohosting the job fair only to the extent that personnel from the unit were involved in planning and implementing the job fair. Employment units of the licensee could be credited with attendance at the job fair, but only if personnel from the employment unit with substantial responsibility in making hiring decisions at the unit in fact participated in the job fair. Put otherwise, although the corporate headquarters can assist in the implementation of menu options, personnel from the respective employment units must also be involved in implementation should they seek credit for participation.

126. LTVG argues that some of the requirements of Prong 3 have been inadequately explained and are therefore arbitrary.¹⁸⁹ It also argues that because the requirements have no rational connection to the Commission's stated purpose for the outreach rules (assuring fair opportunity to all job seekers through broad and inclusive outreach in recruitment), any effort to justify them based on this purpose would be arbitrary. LTVG claims that the requirements are also arbitrary because there is no rational basis for using the coercive power of federal law to induce more people to pursue careers in broadcasting when there is no shortage of qualified employees in the broadcast industry. LTVG further claims that Communications Act does not empower the FCC to adopt the Prong 3 requirements and, even if it does, the requirements would almost certainly be invalid under the First and Fifth Amendments to the Constitution.

127. As explained above, the EEO Rules adopted by the *Report and Order* under Option A required broadcasters and MVPDs to engage in activities selected from a broad menu of options, such as job fairs, community events relating to broadcast employment, internship programs, scholarships, and similar activities. These Prong 3 activities are designed to go beyond the normal recruitment activities directed at filling particular vacancies in order to encourage outreach to persons who may not be aware of the opportunities available in broadcasting or the MVPD industry or have not yet acquired the experience to compete for current vacancies. Thus, interested members of the community will not only have access to information concerning specific job vacancies, but also will be encouraged to develop the knowledge and skills to pursue them. As stated earlier, Prong 3 activities are intended as a method to reach segments

¹⁸⁹ LTVG Comments at 23-27.

of the community who might otherwise be omitted, possibly inadvertently, from vacancy-specific recruitment efforts.¹⁹⁰

128. **Outreach Requirements of Religious Broadcasters.** In the NPRM, we proposed to adopt a policy under which religious broadcasters that elected to apply a religious qualification to all of their employees were not required to comply with the broad outreach recruitment requirement or the menu options, but they must make reasonable, good faith efforts to recruit applicants, without regard to race, color, national origin or gender, among those who are qualified based on their religious belief or affiliation.¹⁹¹ We adopt that policy. This approach reflects our judgment that the more specific recruitment requirements described above may not be suited to recruitment that is limited to members of a certain religious faith. This requirement will also apply to religious broadcasters that elect to establish a religious qualification for some, but not all, of their positions, with respect to those positions that are subject to the religious qualification. Such religious broadcasters, with respect to other positions not subject to a religious qualification, must comply with prongs one and two. A religious broadcaster that treats five or more its full-time positions as non-religious are required to comply with the prong three menu options because, in regard to those positions, the station is in a comparable position to stations that have five or more full-time employees and none subject to a religious qualification. A religious broadcaster electing to treat none of its positions as subject to a religious qualification would be required to comply with all three prongs.

129. Trinity Broadcasting Network (“TBN”) objects to the requirement that a religious broadcaster that establishes a religious qualification make reasonable, good faith efforts to recruit applicants who are qualified based on their religious belief or affiliation on the grounds that it would put the Commission in the position of determining which persons are so qualified.¹⁹² This is not the case. Once an entity establishes its qualifications as a religious broadcaster, it has the discretion to define the religious qualification it seeks to establish. Thus, it may define the qualification generally as encompassing an entire denomination; more specifically as encompassing only persons who share a particular doctrinal belief; or even more specifically as encompassing only persons who are members of a particular church or religious organization. We do not intend to inquire into a religious broadcaster’s definition of its religious qualification. All we require is that some effort be made to notify persons who meet the definition established by the religious broadcaster itself as to the availability of employment at the religious broadcaster’s station.

130. **Outreach Requirements for Noncommercial Broadcasters.** Several commenters representing noncommercial broadcasters suggest that we do not need to impose our EEO requirements on noncommercial broadcasters, such as stations operated by governmental or public educational entities, because they are subject to EEO requirements imposed by other Federal, state or local governments, or policies prescribed by the governmental or educational entity itself.¹⁹³ We are not persuaded. The proposal to exempt non-commercial broadcasters from our EEO rules would, like the NAB proposal to

¹⁹⁰ These types of non-vacancy-specific outreach efforts have been advocated by some broadcasters. See NAB Comments at 22-27; statement of Marilyn Kushak, Vice President of Midwest Family Broadcasters, June 24, 2002 EEO *En Banc* Hearing at Tr. 30-34.

¹⁹¹ *Recon*, ¶ 78, 15 FCC Rcd at 22570.

¹⁹² TBN Comments.

¹⁹³ Comments of Association of Public Television Stations; Comments of National Public Radio; Comments of State University of New York; and Comments of School Board of Broward County, Florida.

rely on programs developed by state associations, be confusing to the public and difficult to enforce. We can not merely assume that a broadly defined class of stations is necessarily subject in each instance to an effective alternative to our requirements, and, even if we could, reliance on such alternate programs would put us in the untenable position of having to resolve whether a broadcaster had violated requirements of other agencies in order to determine whether it was in compliance with our rules.¹⁹⁴

131. **Outreach Requirements for International Stations.** In the *Recon*, we indicated that international broadcast stations licensed pursuant to Section 73, Subpart F, Sections 73.701, *et seq.*,¹⁹⁵ would be subject to our EEO requirements, except for the public file requirement, discussed below, given that such stations are not required to have a public file.¹⁹⁶ We are continuing this requirement in the new rules.

132. **Recordkeeping.** We will require broadcasters to retain documentation concerning their compliance with the three recruitment prongs, as proposed in the *Second NPRM*.¹⁹⁷ This documentation must be retained by the station, but will not be routinely submitted to the Commission. The data must, however, be provided to the Commission upon request in the event of an investigation or audit. The documentation includes: (1) listings of all full-time job vacancies filled by the station employment unit, identified by job title; (2) for each such vacancy, the recruitment sources used to fill the vacancy (including, if applicable, organizations entitled to notification, which should be separately identified), identified by name, address, contact person and telephone number; (3) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies; and (4) documentation necessary to demonstrate performance of the Prong 3 menu options, including sufficient information to disclose fully the nature of the initiative and the scope of the station's participation, including the station personnel involved. This documentation will allow us to verify compliance with our rules; we find no reason to believe that this minimal record retention requirement imposes an unreasonable burden on broadcasters or MVPDs.

133. We also sought comments in the *Second NPRM* as to whether we should require the retention of documentation concerning the recruitment sources that referred hires and interviewees. MMTC urges that we should adopt the requirement in order to ensure that the recruitment process is conducted in good faith and to determine whether recruitment sources are productive in generating applicants.¹⁹⁸ NOW urges us to require retention of records concerning the referral sources of applicants.¹⁹⁹ StBAs opposes tracking the referral sources of interviewees or hires because, it contends, the real purpose is to unconstitutionally track minority and female interviewees and hires using recruitment sources as “proxies for persons of certain races, ethnicities and genders.” It suggests that the process, not the results, is the relevant focus of our rules.²⁰⁰ NCTA argues that documentation verifying

¹⁹⁴ We wish to make clear that a noncommercial licensee can claim credit for efforts made pursuant to other regulations that also comply with our requirements. Thus, if stations are subject to EEO requirements that are the same or more extensive than ours, they would most likely be in compliance with our rules and our rules would impose no additional burden.

¹⁹⁵ 47 C.F.R. Part 73, Subpart F, §§ 73.701 *et seq.*

¹⁹⁶ *Recon*, 15 FCC Rcd at 22562 n.45.

¹⁹⁷ *Second NPRM*, ¶ 32, 16 FCC Rcd at 22853.

¹⁹⁸ MMTC Comments at 140-44.

¹⁹⁹ NOW Comments at 15-16.

that recruitment occurred is sufficient and that collection of data regarding the recruitment sources of hires and interviewees is unnecessary.²⁰¹

134. Our Rule focuses on the process of recruitment, not the results thereof. It is nonetheless necessary to have some means of assessing whether the process has been conducted in good faith and whether the process is working as intended. We expect that broadcasters and MVPDs will analyze the results of their recruitment efforts to ensure that they actually achieve broad outreach. This requires knowledge of what recruitment sources have been productive in generating qualified applicants. Records of the recruitment sources of the most qualified applicants – those interviewed or hired – will be helpful in this regard. We will accordingly require that broadcasters and MVPDs maintain records reflecting the referral sources of interviewees and hires.

135. We will not require the retention of records of the recruitment sources of applicants. Data concerning the recruitment sources of interviewees and hires is sufficient for the limited purpose of determining whether the program is being conducted in good faith and working as intended. Further, although it is minimally burdensome to ascertain the recruitment sources of interviewees and hires because they are readily available to provide this information if it is not reflected in the jobseeker's application, tracking the recruitment source of all applicants may require additional efforts to collect this information. This may place an inordinate burden on broadcasters and MVPDs, particularly in light of the fact that information concerning applicants in the aggregate does not necessarily reflect sources of *qualified* applicants.

136. StBAs' suggestion that our recruitment tracking requirement is surreptitiously intended to track the number of minorities and females in applicant pools is baseless. Nothing in our rules requires, or gives preference, to the use of minority or female oriented recruitment sources. Indeed, minorities and females likely are referred by all sources, including the Internet or newspapers, so that it is impossible to draw any conclusion as to the numbers of minorities and females interviewed or hired based solely on the identity of recruitment sources.

137. We will require that all records documenting outreach efforts be retained until the grant of the renewal application covering the license term during which the hire or activity occurs, except that, if a licensee acquired a station pursuant to an assignment or transfer that required Commission approval of FCC Form 314 or 315 during the license term, it need not retain records pertaining to the outreach efforts of a prior licensee. In order to minimize any burden associated with this requirement, records may be maintained in an electronic format, *e.g.*, by scanning pertinent documents into a computer format. Absent a showing of extraordinary circumstances, we will not credit claimed activities that cannot be supported by records.

138. In the case of religious broadcasters that apply a religious qualification to some or all of their hires, they need only retain, in the case of hires subject to the qualification, documentation as to the full-time vacancies filled, the recruitment sources used, the date each vacancy was filled, and the recruitment sources of the hires. This information is pertinent to monitoring whether the broadcaster

²⁰⁰ StBAs Comments at 41-42.

²⁰¹ NCTA Comments at 15.

made reasonable, good faith efforts to recruit among persons who meet the applicable religious qualification.²⁰²

139. **Public File.** We will adopt the requirement that broadcasters place in their public file annually, on the anniversary of the date they are due to file their renewal applications, an EEO public file report containing the following information: (1) a list of all full-time vacancies filled by the station employment unit during the preceding year, identified by job title; (2) for each such vacancy, the recruitment source(s) used to fill the specific vacancy (including organizations entitled to notification of vacancies pursuant to Prong 2, which should be separately identified), including the address, contact person, and telephone number of each source; (3) a list of the recruitment sources that referred the people hired for each full-time vacancy; data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and, for each recruitment source used in connection with any such vacancies, the total number of interviewees referred by that source; and (4) a list and brief description of Prong 3 menu options implemented during the preceding year.²⁰³ Religious broadcasters with hires subject to a religious qualification need include, for full-time vacancies subject to the qualification, only the information called for in (1) and (2) above, along with information concerning the recruitment sources that referred the persons hired.²⁰⁴

140. Some broadcasters object that documentation concerning a station's EEO efforts should not be made available to the public.²⁰⁵ To the contrary, as we indicated in the *Report and Order*, the public has an important role in monitoring broadcaster compliance with our EEO Rule.²⁰⁶ The EEO public file report is designed to facilitate meaningful public input. We recognize broadcaster concerns that the availability of this information could trigger unwarranted, even frivolous, filings.²⁰⁷ Nonetheless, the possibility of abuses by some does not warrant depriving the public of its right to participate in the process of monitoring and enforcing our EEO Rule, which directly impacts them.

141. We will also require that broadcasters post the EEO public file report on their web site, if they have one.²⁰⁸ The purpose of this requirement is to facilitate access by persons within the service area. We do not believe that our requirement to place EEO public file report information on a station's web site is unreasonable or overly burdensome. In the *Recon*, we denied NAB's request that we eliminate

²⁰² *Recon*, ¶ 79, 15 FCC Rcd at 22570.

²⁰³ We recognize that in some years the licensee may not have implemented any outreach initiatives. If a broadcaster has deferred its initiatives to the second year of the implementation cycle, it may indicate "none" in the EEO public file report for the first year, accompanied by an appropriate explanation.

²⁰⁴ *Recon*, ¶ 80, 15 FCC Rcd at 22570.

²⁰⁵ StBAs Comments at 55.

²⁰⁶ *Report and Order*, ¶ 123, 15 FCC Rcd at 2379.

²⁰⁷ NAB Comments at 36; Statement of Ann Arnold, Executive Director, Texas Association of Broadcasters at EEO *En Banc* Hearing, Tr. 41-43.

²⁰⁸ Although the reports must be retained in the public file until final action has been taken on the station's next renewal application, all reports need not be maintained on the station's web site. The requirement to post a station's EEO public file report on its web site extends only to the current report. Also, we require only that the information contained in the EEO public file report be placed on the web site. A scanned copy of the actual paper report contained in the public file need not be placed on the web site; any legible format may be used.

the requirement because of the alleged burden that it placed on broadcasters. We found that NAB had failed to establish the extent of any such burden or the costs involved in addressing them.²⁰⁹ In this proceeding, NAB cites data from another proceeding in which we proposed to require that television stations post their entire public file on their own web site or a state association web site.²¹⁰ That data, however, pertains to the posting of as much as 14,000 pages of documentation. The requirement at issue here involves only a single document. Also, it does not require web posting unless the station already maintains a web site; it does not require that one be created. NAB provides no additional documentation as to the possible burden of this requirement beyond that which we found insufficient in the *Recon*.²¹¹ NAB also contends that the requirement to place the EEO public file report on a station's web site, if it has one, might deter stations that do not currently have web sites from initiating them. We find this suggestion speculative, at best. Finally, NAB objects to the requirement because it would make the EEO public file report available to persons outside of a station's community. As we indicated in the *Recon*, the purpose of the requirement is to facilitate access by persons within the station's service area. That persons outside the service area may also access it is immaterial.²¹²

142. As we indicated in the *Report and Order*,²¹³ broadcasters are free to use any format in their public file report to avoid unnecessary duplication as long as the report clearly provides the information requested. For instance, if a broadcaster used the same recruitment sources for all its vacancies, it may maintain a single list of those sources, indicating that they were used for all vacancies. If a broadcaster used different sources for different vacancies, it may maintain a master list of all its sources and use a cross-reference system to show which sources were used for which vacancies.

143. The EEO public file report need not be routinely submitted to the Commission, except in two instances. The EEO public file reports covering the two-year period preceding the filing of a renewal application must be submitted with that application as an attachment to Form 396, and will be one basis for our review of the broadcaster's compliance at renewal time. Also, for stations subject to mid-term reviews, the EEO public file reports for the two-year period preceding the mid-term review must be filed with the Commission and will be one basis for mid-term reviews. Renewal and mid-term review procedures are discussed in greater detail below.

144. Because the filing dates for the EEO public file reports are tied to the date of filing of renewal applications, the due dates will apply to a given station regardless of when the licensee acquired the station. Consequently, if there is a substantial change of ownership requiring approval pursuant to FCC Form 314 or FCC Form 315 during the one-year period covered by an EEO public file report, the

²⁰⁹ *Recon*, ¶ 32-33, 15 FCC Rcd at 22558.

²¹⁰ *Notice of Proposed Rule Making in MM Docket No. 00-168*, 15 FCC Rcd 19816 (2000), cited in NAB Comments at 29 -33.

²¹¹ In addition, according to a 2001 survey, 91 percent of television stations and 75 percent of radio stations operate web sites. Furthermore, 91 percent of television stations post local news on their web sites and numerous stations have elaborate and sometimes continuously updated special features such as neighborhood weather forecasts. "RTNDA/Ball State University, Radio and Television Web Survey (2001)," available at <http://www.rtna.org/technology/web.shtml#survey>. Cited by NOW Reply Comments at 23.

²¹² *Recon*, ¶ 33, 15 FCC Rcd at 22558.

²¹³ *Report and Order*, ¶ 124, 15 FCC Rcd at 2380.

new licensee must place the report in the public file by the due date. However, the information contained in the report would encompass only EEO efforts undertaken by the new licensee.

145. AWRT suggests that the EEO public file report be filed with the Commission annually or that reports for the four preceding years should accompany mid-term and renewal filings in order to provide a more complete picture of the licensee's EEO record.²¹⁴ We will partially adopt this proposal by requiring EEO public file reports for the two years preceding the filing of mid-term reports and renewal applications. This will be sufficient for our ordinary review of licensees' EEO compliance and will cover the full two-year period that stations have to comply with the Prong 3 menu options. Of course, we will request additional reports and other information if we deem it necessary. Also, the public can bring to our attention any problems they perceive in the EEO public file reports that we do not review. As indicated, licensees will be required to retain the reports in their public file until their next renewal is granted.

146. The EEO public file report will be filed for station employment units, rather than only for individual stations. A "station employment unit" will be defined, as it was under our former Rule, as including a station or group of commonly owned stations in the same market that shared at least one employee.²¹⁵ We will leave the definition of the "market" to each licensee's good faith discretion. In making this determination, however, a licensee should assess the technical coverage of its station(s); its marketing, promotional, and advertising practices; the pertinent market definitions adopted by public agencies or commercial services, such as Nielsen and Arbitron; and requests for notices of job vacancies from locally-based community groups. We expect a licensee to be able to provide a reasonable explanation for its determination should it become an issue. Finally, stations in the same market should be considered part of the same employment unit even if the licenses are held by different business entities that are commonly owned or controlled. We would view licensees as commonly owned for the purpose of the EEO Rule if 50 percent or more of the voting control of the licensees is held by the same persons or entities.

147. If a station is subject to a time brokerage agreement, the licensee's EEO public file report should include data concerning only its own recruitment efforts for full-time positions and not the efforts of the broker. If a licensee is a broker of another station or stations in the same market as an employment unit including a station or stations of which it is the licensee, the licensee's EEO public file report should include data concerning its EEO efforts at both the owned and brokered stations. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include information concerning its EEO efforts at the brokered station in the EEO public file report for its own station that is geographically closest to the brokered station. The same policy will apply to EEO forms filed at mid-term (where applicable) (Form 397) and at renewal (Form 396), discussed below. Non-licensee brokers are not required to file EEO public file reports because they are not licensees. If a broker is controlled directly or indirectly by a licensee or licensees, however, it should be considered a licensee-broker.

148. We recognize that there may be some employment units that are located in markets that include stations licensed to communities in more than one state that are in different renewal groups. As a result, the date of the last renewal application filing differs for some stations in the same employment unit, so that there could arguably be two dates governing the placing of the EEO public file report in the public file because that date is based on the anniversary of the filing of the last renewal application. The same problem arises with respect to the filing of mid-term reports (FCC Form 397), discussed below. It is not our intent that employment units comply with these requirements more than once merely because they

²¹⁴ AWRT Comments at 15.

²¹⁵ *Report and Order*, ¶ 108, 15 FCC Rcd at 2375.

include stations in more than one renewal group. Accordingly, we will generally expect employment units in this situation to proceed in accordance with the schedule for only one of the renewal groups included in their unit. There may be rare instances involving television stations, however, when it will be necessary for us to request a supplemental filing in order to comply with the statutory requirement that we conduct mid-term reviews of television licensees' EEO compliance.

149. An employment unit consisting of stations in more than one renewal group may select the renewal group that it will use for the purpose of determining the filing dates for its annual public file reports and its mid-term report, where applicable, in accordance with the following criteria. If the employment unit includes a television station, the dates for the television station should ordinarily govern, in order to accommodate the statutory requirement for mid-term review of television licensees' EEO compliance. Apart from this situation, the renewal group that will determine the employment unit's EEO filing schedule should be selected so as to minimize the time between the date for placing the EEO public file report in the public file and the date for the filing of renewal applications for stations located in renewal groups that have different renewal filing dates than the renewal group used to determine the employment unit's EEO filing schedule.²¹⁶

150. There may also be circumstances in which an employment unit consists of television and radio stations that are part of the same renewal group, except that the renewal schedule for radio is one year earlier than the schedule for television.²¹⁷ In these circumstances, the filing schedule for television stations should be used for purposes of filing the mid-term report (FCC Form 397) for the employment unit, if it is subject to the requirement to file a mid-term report. This report would cover all stations in the employment unit. Thus, there would be no need to file a separate mid-term report for the radio station(s). Because the date for placing the annual public file report in the public file is the same for both radio and television, the most recent public file report should be submitted with the renewal applications for both television and radio stations in the employment unit.²¹⁸

151. Renewal applications must still be filed separately for each station in accordance with the regular schedule for the station's renewal group. FCC Form 396, the EEO form submitted with the renewal application, discussed below, requires that the licensee attach the EEO public file report that is ordinarily placed in the public file simultaneously with the filing of the renewal application, as well as the report for the prior year. When a station is part of an employment unit that is using the EEO filing schedule for another renewal group, the station should submit with its FCC Form 396 the most recent EEO public file report prepared for the employment unit.²¹⁹ If the licensee feels that the most recent EEO

²¹⁶ *Recon*, ¶ 74, 15 FCC Red at 22569.

²¹⁷ For instance, in the case of the North Carolina and South Carolina renewal group, the next renewal applications for radio stations are due by August 1, 2003, whereas the next renewal applications for television stations are due by August 1, 2004.

²¹⁸ Thus, a radio station in North Carolina would submit with its renewal application the report placed in the public file on August 1, 2003, and a North Carolina television station in the same employment unit would submit the report placed in the public file on August 1, 2004.

²¹⁹ For instance, an employment unit consisting of radio stations licensed to communities in both Kansas and Missouri might choose to utilize the dates applicable to the renewal group that includes Kansas for EEO filing purposes. The Missouri station(s) in the employment unit will still file its next renewal application on October 1, 2004, the regular filing date for Missouri radio renewals. However, because the employment unit will use the EEO filing schedule for Kansas, the Missouri renewal applicant should attach to its FCC Form 396 the EEO public file report placed in its public file on February 1, 2004, the anniversary date of the filing of Kansas renewals, as well as

public file report does not accurately reflect the employment unit's EEO program as of the date of the filing of the renewal application, it should disclose any pertinent facts as part of the narrative statement also required by the FCC Form 396.

152. Low power television (LPTV) stations are subject to the broadcast EEO Rule by virtue of a cross-reference contained in Section 74.780 of the Commission's Rules.²²⁰ However, LPTV stations are not required to maintain a public file. As indicated in the *Recon*, we will not expect them to prepare an EEO public file report, although LPTV stations with five or more full-time employees must comply with the recordkeeping requirements.²²¹ Class A television stations, however, are subject to the requirement to maintain a public file and are fully subject to the EEO Rule, including the requirement to prepare an EEO public file report.

153. **Enforcement.** We will adopt the enforcement process proposed in the *Second NPRM*, which is similar to that adopted in the *Report and Order*, except that we are eliminating the requirement that broadcasters certify compliance with the EEO Rule in the second and sixth years of their license term. We will conduct mid-term review of television stations with five or more full-time employees and radio stations with more than ten full-time employees, using FCC Form 397. We treat television stations differently from radio stations because of the requirements of Section 334 of the Communications Act which does not permit us to exempt television stations with five to ten full-time employees from the mid-term requirement.

154. We will also review a licensee's compliance with our EEO Rule at renewal time. NAB urges that appropriate safeguards should be instituted so as to protect broadcasters from unwarranted or frivolous petitions to deny.²²² Under Section 309(d)(1) of the Communications Act, parties in interest have a statutory right to file petitions to deny.²²³ In addition, it would not be desirable, to restrict the right of parties to file petitions to deny or informal objections alleging EEO violations because, as indicated, the public has a legitimate role in the enforcement of our EEO Rule.

155. We will also monitor EEO compliance through random audits and targeted investigations resulting from information received as to possible violations. Each year we will select for audit approximately five percent of all licensees in the radio and television services, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. Initially, the inquiry may request the contents of the station's public file. Further inquiry or inquiries may be conducted requesting additional documentation of recruitment efforts that is not in the public file. Based on the circumstances of the case, the inquiry could potentially include,

the report placed in the public file on February 1, 2003.

²²⁰ Licensees of low power FM (LPFM) stations are subject to the Commission's prohibition against employment discrimination. See 47 C.F.R. § 73.881. However, LPFM licensees are not required to comply with any EEO program requirements. As we stated in the LPFM Report and Order, "[b]ecause we anticipate that the vast majority of this class of licensees will employ very few (if any) full-time, paid employees, we do not intend to require LPFM licensees to comply with any EEO program requirements we adopt in our rulemaking proceeding." *Report and Order*, 15 FCC Rcd 2205, 2278 (2000).

²²¹ *Recon*, ¶ 48, 15 FCC Rcd at 22562.

²²² NAB Comments at 36. See also June 24, 2002 EEO *En Banc* Hearing, Tr. 41-42.

²²³ 47 U.S.C. § 309(d)(1).

but not be limited to, 1) a request for data covering any period of the license term; and 2) interviews of witnesses, including any complainant and present or former station employees.

156. Licensees will be subject to a variety of sanctions and remedies for EEO Rule violations or deficiencies. Some examples of violations or deficiencies might include: engaging in employment discrimination in hiring or promotions; failure to file a mid-term review when due; failure to file an EEO public file report when due; failure to file Form 396 when due; misrepresentation of outreach efforts or other information; non-responsiveness or evasion in responding to a written Commission inquiry; failure to recruit for all vacancies absent exigent circumstances; failure to widely disseminate information concerning vacancies for full-time positions; failure to analyze routinely the adequacy of the various program elements in achieving broad outreach to all segments of the community; failure to undertake the required Prong 3 menu options; and failure to notify organizations that request vacancy notices. Also, it may constitute a violation of the EEO Rule if, based on all of the evidence, we determine that a licensee has attempted to evade our requirements through token or sham efforts.

157. We take the EEO rules and obligations we establish here very seriously, and fully expect broadcasters and MVPDs to do the same. We remind licensees that it is as true today as it was 20 years ago that a "documented pattern of intentional discrimination would put seriously into question a licensee's character qualification to remain a licensee."²²⁴ We intend to carefully monitor compliance with our EEO rules. Sanctions and remedies that may be issued by the Commission for deficiencies in licensees' EEO compliance include admonishments, reporting conditions, forfeitures, short term renewal of license, or designation for hearing for possible revocation of license or denial of renewal. The appropriate sanction or remedy will be determined on a case-by-case basis. Sanctions will be greater in cases involving recidivism, continuous EEO non-compliance, or intentional discrimination. In particular, if sufficiently egregious violations are found, we will not hesitate to designate for hearing.

158. We will also be taking steps to ensure that broadcasters, MVPDs, and the public are aware of and able to comply with the EEO rules and policies. First, we will continue to maintain an EEO page on the Commission's website.²²⁵ In addition, our Consumer & Governmental Affairs Bureau (CGB) will provide information to the public on the new rules adopted by the Commission. CGB will make a factsheet on the rules available to the public through our consumer centers and our website.²²⁶ Furthermore, Commission staff will continue to participate in conferences held throughout the country that deal with broadcast and MVPD EEO issues. Finally, as always, our EEO staff is available to answer more specific questions and provide informal guidance regarding the rules.²²⁷ We encourage the industry and the public to take advantage of these resources.

159. **Forms Relating to EEO Compliance.** We readopt the forms adopted in the *Report and Order*, incorporating the changes discussed above. Primarily, we eliminate the portion of the forms that

²²⁴ *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 U.S. 621, 628-29 (D.C. Cir. 1978) (en banc).

²²⁵ The EEO page can be found at www.fcc.gov/mb/policy/eoo/.

²²⁶ Consumers can contact our consumer centers by calling 1-888-CALL-FCC (1-888-225-5322) (Voice) and 1-888-TELL-FCC (1-888-835-5322) (TTY). Consumer information is available on the Commission website at www.fcc.gov/cgb.

²²⁷ The EEO staff can be reached at (202) 418-1450.

provided for an election between Option A and Option B because our present Rule does not provide for an election. We also will not reissue the Initial Election Statement, which required a licensee to choose between Option A and Option B. We are addressing here only forms relating to our EEO outreach requirements. As indicated, FCC Form 395-B, the Annual Employment Report, which is being deferred, is unrelated to the implementation and enforcement of our EEO program.

160. We readopt, with modifications, FCC Form 396, which is filed by broadcasters as part of their renewal applications. As indicated, we will delete the Option A/Option B election. The form as adopted by the *Report and Order* also required the broadcaster to certify that it complied with the EEO Rule during the two-year period preceding the filing of the report; to attach a copy of its EEO public file for the preceding year; and to provide a narrative statement demonstrating how the station achieved broad outreach during the preceding two years. StBAs objects to the certification requirement because of the risk that a broadcaster would be charged with the character violation of misrepresentation arising from a genuine misunderstanding of the Rule.²²⁸ Without passing on StBAs' objection, we find the certification requirement now to be unnecessary given that we are requiring the submission of the EEO public file report from which we can make our own determination as to the licensee's compliance. In addition, the licensee must still certify to the accuracy of the forms it submits to the Commission; it just need not draw a legal conclusion as to whether the facts it submits demonstrate compliance with our rules. Accordingly, we will modify the form to eliminate the certification requirement. We will, however, require the submission of the EEO public file report due at the time of the filing of the Form 396 along with the form filed one year before that. This is because we allow two years for the performance of the Prong 3 menu options. We recognize that in some instances a station may have been sold during the prior two years. In that case, the licensee at the time of renewal need only submit EEO public file reports relating to its own operation of the station.

161. MMTC urges that we should include in the FCC Form 396 a requirement that the licensee report whether it intends to change the elements of its EEO program during the coming license term.²²⁹ We decline to adopt this proposal because licensees are free to alter the elements of their EEO programs as circumstances warrant. No purpose would be served by requiring licensees to anticipate at renewal time any possible changes that might be implemented over the ensuing eight year license term and potentially lock them into a particular program during that time. To the contrary, we expect and anticipate that licensees will continuously evaluate their compliance programs and improve upon them whenever and wherever possible.

162. The version of Form 396 adopted by the *Report and Order* included the following question: "Have any complaints been filed before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station(s)?" In the *Second NPRM*, we stated that the form required the reporting of "pending" discrimination complaints.²³⁰ However, we did not clarify the period of time to which the word "pending" referred, e.g., pending at any time during the most recent license term or pending at the time a renewal application is filed. StBAs urges that we should exclude from the scope of our reporting requirement complaints that have been resolved without an adverse finding against the broadcaster prior to the filing

²²⁸ StBAs Comments at 5.

²²⁹ MMTC Comments at 137.

²³⁰ *Second NPRM*, ¶ 35, 16 FCC Rcd at 22854.

of the renewal application.²³¹ MMTC has no objection to excluding complaints that were filed and subsequently resolved on the merits in the broadcaster's favor. It notes, however, that complaints disposed of without a ruling on the merits, *e.g.*, on procedural grounds, may remain relevant and could lead to relevant evidence of discrimination.²³² We agree that complaints dismissed on procedural grounds or pursuant to a settlement may remain relevant. We wish to avoid unnecessary litigation, however, as to whether a given complaint was resolved on the merits or dismissed for procedural reasons. Accordingly, we will require the reporting of all complaints filed during the most recent license term, consistent with our past practice. This will avoid unnecessary litigation and involves little additional burden. Form 396 requests information concerning the disposition or current status of the complaint, and the Commission will consider complaints only to the extent they are deemed relevant.

163. FCC Form 396-A is to be used for applications for the construction of a new broadcast station or for the sale of an existing broadcast station. We will readopt this form but delete references to the Option A/Option B election.

164. We adopted in the *Report and Order* FCC Form 397, "Broadcast Statement of Compliance," which was to be submitted in the second, fourth, and sixth years of the license term for the purpose of certifying whether the licensee's station employment unit complied with the EEO Rule during the preceding two years. In the *Second NPRM*, we proposed to use the Form 397 only for the purpose of filing mid-term reviews, renaming it the "Broadcast Mid-term Report." We will adopt this proposal. Thus, Form 397 will be filed by licensees subject to mid-term review. We will modify Form 397 to eliminate the reference to an election. In addition, consistent with our discussion concerning Form 396, we will eliminate the compliance certification requirement and instead require submission of EEO public file reports for the two years preceding the filing (unless the earlier report does not pertain to the current licensee because of a sale). Two groups of television stations would be required by our new rules to file mid-term reports in 2003: New Jersey and New York filings would be due by February 1, 2003, and Delaware and Pennsylvania filings would be due by April 1, 2003. Because of the extremely short time between the anticipated effective date of the rules and the filing dates, we will not require stations in these groups to file mid-term reports in 2003.

165. **Provisions for Small Stations and Small Markets.** The Rule adopted by the *Report and Order* exempted from the outreach provisions (but not the nondiscrimination provisions) station employment units that had fewer than five full-time (30 hours per week or more) employees. As noted, a "station employment unit" referred to a station or group of commonly owned stations in the same market that shared at least one employee. We will include this exemption in our new Rule. We also provided in the *Report and Order* that station employment units with five to ten full-time employees would be required to perform only two, rather than four, Prong 3 menu options every two years.²³³ We will incorporate this requirement in our new Rule. In addition, we will extend it to certain small market stations, as discussed below. We further provided in the *Report and Order* that radio station employment units with five to ten full-time employees would be exempt from the mid-term review requirement. We

²³¹ StBAs Comments at 56;

²³² MMTC Comments at 61 n. 165.

²³³ *Report and Order*, ¶ 126, 15 FCC Rcd at 2381.

did not extend this relief to television stations because of the requirements of Section 334 of the Communications Act.²³⁴ We will include this exemption for radio in our new Rule.

166. In the *Second NPRM*, we asked whether we should expand the exemption for small stations to include employment units with ten or fewer employees. We also asked whether we should modify the requirement that stations with more than 10 full-time employees complete four menu options every two years. Smaller stations with five to 10 or fewer full-time employees are required to complete two menu options every two years. We further asked whether we should treat all stations with five or more full-time employees that are located in smaller markets like smaller stations.²³⁵ Having reviewed the record, we find no basis for increasing the pertinent exemptions, except that we find some modification warranted with respect to the menu option requirements applicable to stations in smaller markets.

167. NAB supports exempting stations with fewer than ten full-time employees. It states that such stations face unique obstacles in complying with our Rule because of a lack of personnel and resources, difficulties in competing with larger stations, a lack of access to the resources to implement Prong 3 menu options, and the unavailability of the alternative provided by Option B of the former Rule. It notes that the *Report and Order* previously rejected an increase in the general exemption because small stations provide entry-level opportunities in the broadcast industry.²³⁶ NAB questions the continued viability of this assumption. NAB also contends that stations in smaller markets face difficulties similar to those facing stations with fewer than ten full-time employees, especially in complying with Prong 3 menu options.²³⁷ The Association of Public Television Stations supports an exemption for stations with ten or fewer employees because of the funding problems of small public television stations, especially those outside of top 100 markets, and difficulties experienced in attracting and retaining minority employees.²³⁸ LTVG urges that we should exempt stations with fewer than 100 employees, to parallel EEOC rules.²³⁹ MMTC, NOW, AWRP, NAACP, and the Lawyers' Committee for Civil Rights Under Law oppose an increase in the exemptions, citing primarily the opportunity for entry into the industry provided by small stations.²⁴⁰

168. With one exception, we find no basis in the record to provide additional exemptions from our Rule beyond those referenced above. First, we reject as unsupported in the record any suggestion that the Rule we adopt today imposes unreasonable burdens on small broadcasters. As a general matter, the Rule imposes minimal burdens. In addition, small broadcasters are permitted to perform fewer menu options, and most likely will have fewer hires, resulting in fewer records to keep and fewer job vacancies requiring recruitment under the Rule. Further, as we found in the *Report and Order*, small stations provide entry-level opportunities in the broadcast industries and make up approximately 1/3 of the

²³⁴ *Report and Order*, 15 FCC Rcd at 2381 n.195.

²³⁵ *Second NPRM* ¶ 29, 48, 16 FCC Rcd at 22852, 22857.

²³⁶ *Report and Order*, ¶ 126. 15 FCC Rcd at 2381.

²³⁷ NAB Comments at 54-58.

²³⁸ Association of Public Television Stations Comments at 8-9.

²³⁹ LTVG Comments at 33.

²⁴⁰ MMTC Comments at 97-100; NOW Comments at 22-27; AWRP Comments at 17-18; NAACP Comments at 2-3; Lawyers' Committee for Civil Rights Under Law Comments at 5.

broadcast industry.²⁴¹ If we were to exempt such a large number of stations from the EEO Rule -- stations that may provide entry level opportunities for people new to broadcasting -- we would undermine the central purpose of our EEO Rule. We decline to do so.

169. We find that it would be appropriate, however, to modify our Prong 3 menu option requirement for stations in smaller markets. We recognize that smaller markets may not have the resources in the community to support some of the activities contemplated in Prong 3. We did not address this problem in the *Report and Order* because small market stations that found the menu option requirement burdensome could elect to proceed under Option B. That alternative, however, will not be available under our new Rule. We will accordingly provide that small market stations will be required to perform only two, rather than four, menu options during a two year period.

170. We will define the scope of this exemption as extending to any station employment unit consisting solely of a station or stations licensed to a community that is located in a county that is outside of all metropolitan areas, as defined by OMB, or is located in a metropolitan area that has a population of fewer than 250,000 persons. This will operate to reduce requirements for stations in most markets below the 100 largest markets using definitional criteria that are readily ascertainable from government sources.²⁴²

171. NAB requests that we reinstate a policy from our pre-*Lutheran Church* rules that did not require "the submission of information on a station's EEO efforts to recruit minorities from those stations in markets with a minority labor force of less than five percent."²⁴³ In the *Recon*, we denied a similar request.²⁴⁴ NAB has presented no basis for a different result now. In particular, NAB ignores the fact that the policy in question was never a wholesale exemption from the Rule because women are present in all markets. In any event, our new Rule does not require that broadcasters target minorities. There is accordingly no need to exempt them from the requirement of a prior rule that no longer is applicable.

172. In the *Recon*, we adopted a policy pursuant to which an owner who has a controlling interest (50 percent or greater voting control) in a licensee would not be considered a station employee for purposes of the EEO Rule, even if he or she worked at the station. We concluded that such an owner's employment at the station would be more an incident of ownership rather than a normal employment relationship because the owner could not be in any normal sense hired or fired. We declined to extend this policy to lesser ownership interests because the circumstances pertaining to their employment might vary widely and we could not assume that the employment was primarily an incident of ownership.²⁴⁵

²⁴¹ Our analysis of FCC Form 395-B forms filed in 2000 reflects that there were 4,802 stations reporting five to ten full-time employees. This represents 33.4 percent of the 14,393 stations licensed as of September 30, 2000, the deadline for the filing of the 2000 Form 395-B.

²⁴² The most recent OMB definition of metropolitan areas is contained in OMB Bulletin No. 99-04 (June 30, 1999). See <http://www.whitehouse.gov/omb/inforeg/msa-bull99-04.html>. Metropolitan areas with a population of fewer than 250,000 are defined as Level C and D MSAs or primary MSAs (PMSAs). OMB Bulletin No. 99-04 may be used initially to define areas subject to this provision. OMB has adopted new metropolitan area standards and will announce definitions of areas based on the new standards and Census 2000 data in 2003. *Standards for Defining Metropolitan and Micropolitan Statistical Areas*, 65 Fed. Reg. 82228 (2000).

²⁴³ NAB Comments at 58-59.

²⁴⁴ *Recon*, ¶ 12-15, 15 FCC Rcd at 22553.

²⁴⁵ *Recon*, ¶ 82, 15 FCC Rcd at 22571.

Fletcher, Heald & Hildreth, P.L.C. (“FHH”), on behalf its clients, filed a petition for reconsideration, urging that owners with 20 percent or greater interests should be not be treated as “employees” for purposes of the EEO Rule. We had not acted on FHH’s petition when the Court’s decision in *Association* was issued. Accordingly, we asked for comments on FHH’s proposal in the *Second NPRM*.²⁴⁶ It renews its proposal in its comments filed in response to the *Second NPRM*.

173. We will adopt FHH’s suggestion. Thus, we will not consider owners holding a 20 percent or greater voting interest in a licensee as station “employees” for EEO purposes. This will be subject to the proviso, however, that no single owner has positive control (greater than 50 percent voting control) of the licensee. In that circumstance, the principal enjoying positive control would be in a position to determine whether other stockholders could be employed at the station, and only he or she could properly claim employment as an incident of ownership. Absent that circumstance, it is reasonable to believe that a 20 percent or greater owner’s employment position is an incident of ownership. Someone who owns a 20 percent interest in a licensee company is not truly an employee of the licensee, holding a position that would be subject to recruitment, and thus should be permitted to work at the station without first requiring outside recruitment. FHH suggests that we should, as a safeguard, require that the owners have made a capital contribution. We do not find this necessary. Legitimate ownership interests may exist that do not involve a capital contribution. In the event of alleged abuse of this exception, we will consider all relevant factors, including the extent of an asserted owner’s capital contribution to determine the legitimacy of a claimed ownership interest.

174. LTVG suggests that broadcasters should be permitted to hire owners with two percent or greater equity or their immediate family without recruitment. The justification cited is to allow the hiring of family members in a family-owned business.²⁴⁷ In the case of interests of less than 20 percent, however, it cannot be assumed that a position at the station is an incident of ownership. We further find no basis for providing an exemption from the recruitment requirement based on a family relationship with an owner because it could disadvantage possibly better qualified outside applicants. Accordingly, we decline to adopt this proposal.

3. MVPD EEO Program Requirements

a. Rules and Policies

175. We will adopt substantially the same outreach program, recordkeeping and reporting requirements for MVPDs, as we have for broadcasters. The only distinctions will arise in light of the specific requirements imposed by Section 634 of the Communications Act. Thus, we monitor the EEO programs pursuant to annual reports which have contained employment and program data, as required by statute. We will be creating a new form, described below, that will contain only program data. As mentioned above, we are deferring consideration of a new form for MVPDs that requires employment data. Because our review of MVPD EEO compliance is an annual review pursuant to Section 634, we define the Prong 3 menu options requirement for MVPDs in terms of performing two initiatives annually for those with more than ten full-time employees or one initiative annually for those with six to ten full-time employees. NCTA generally supported our proposed rules in its Comments.

²⁴⁶ *Second NPRM*, ¶ 1, 16 FCC Rcd at 22843.

²⁴⁷ LTVG Comments at 32-33.

176. With respect to the definition of “community” for the purpose of determining broad outreach, NCTA argues that cable operators should be able to define their “community” as encompassing only the areas they are franchised to serve.²⁴⁸ As noted in paragraph 92 above, we are not adopting the proposal in the *Second Notice* to use MSAs as a means of defining “community” for the purpose of determining broad outreach. Rather, we are leaving the definition of “community” for this purpose to the reasonable good faith discretion of the entity concerned. We will apply the same policy to MVPDs. MVPDs should use pertinent criteria discussed in paragraph 92, *supra*, including the location of the system, pertinent market definitions adopted by public agencies or commercial services, and requests for notices of job vacancies from locally-based community groups. They should also consider what areas actually produce job applicants. MVPDs should engage in broad outreach throughout the entire local community from which they can reasonably expect to elicit applicants, whether or not that community is defined by its franchise area.

177. American Cable Association (“ACA”), a trade association of small system and small market cable operators, urges us to provide an exemption from the outreach requirements and streamlined recordkeeping and reporting requirements to cable systems with fewer than 15,000 subscribers or, in the alternative, with ten or fewer employees.²⁴⁹ ACA premises its request on the fact that the Commission previously provided relief to systems with fewer than 15,000 subscribers in the context of rate regulation.²⁵⁰ The EEO requirements we are adopting, however, are not comparable to rate regulation and we do not believe that cable systems employing six or more full-time employees will experience hardship in complying with the outreach requirements. Moreover, ACA estimates that the requested relief might extend to systems employing 14,000 of what ACA estimates to be a total of 131,000 employees in the cable industry.²⁵¹ If correct, more than 10 percent of the industry would be exempt under ACA’s proposal. We accordingly decline to adopt any additional provisions relating to small systems beyond those already proposed in the *Second NPRM*, except that we will, as in the case of broadcasters, adopt a provision requiring the performance of fewer Prong 3 menu options by systems in smaller markets. Thus, smaller market cable operators, as well as other MVPDs, will be required to perform only one menu option per year. We will use the same definition of a small market that we are using for broadcast stations.

178. MVPD compliance with the EEO requirements is monitored pursuant to annual reports filed by MVPDs: FCC Form 395-A (for cable operators) and FCC Form 395-M (for other MVPDs). The only substantive modification required by the new rules adopted today is the elimination of the Option A/Option B election. In addition, we will combine these forms. The two forms are virtually identical except for a section in the Form 395-A requiring cable operators to list the communities in which they operate. In view of the similarity of the two forms, we do not find any necessity for having separate forms for cable operators and other MVPDs. Both forms request information concerning the entity’s EEO outreach program. In addition, both forms request information as to the gender and racial/ethnic composition of the entity’s workforce, analogous to the broadcast Form 395-B. As in the broadcast context, the data concerning the entity’s workforce is no longer pertinent to the administration of our EEO outreach requirements. We will accordingly adopt at this time a single form, FCC Form 396-C,

²⁴⁸ NCTA Comments at 3-4.

²⁴⁹ ACA Comments at 2.

²⁵⁰ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393 (1995).

²⁵¹ ACA Comments at 7.

which will include the portions of Forms 395-A and 395-M relating to EEO outreach, but not the portion eliciting data concerning the entity's workforce, for use by all MVPDs. We will consider the adoption of a new form for eliciting workforce data from MVPDs as part of the future Report and Order in which we will also address the broadcast Form 395-B.

C. Constitutional Issues

179. StBAs argues that requiring broadcasters to disclose publicly the racial and gender composition of their employees on FCC Form 395-B would create constitutional problems because the Commission will use the data in EEO enforcement decisions and private groups will use the data to pressure broadcasters to adopt race or gender-based hiring policies by pursuing actions against them before the Commission.²⁵² According to StBAs, it was this kind of pressure, whether applied by government regulators or by third parties, that the court found unconstitutional in *Lutheran Church*.

180. As discussed earlier, the Commission is deferring consideration of Form 395-B at this time. The court in *Association* upheld Option A of the EEO Rule as constitutional because it found that broadcasters were not pressured to recruit minorities and women under Option A. The recruitment outreach provisions we are adopting in this *Second Report and Order and Third Notice of Proposed Rule Making* are the same in all material respects as the basic requirements of Option A. In enforcing the EEO Rule, the Commission will not pressure employers to favor anyone on the basis of race, ethnicity, or gender. Therefore, as a race and gender neutral regulation, the EEO Rule we are adopting today raises no equal protection concerns.

181. LTVG alleges that broadcasters should not be required to post their EEO public file reports on their websites because this requirement is "probably unconstitutional under the First Amendment." Radio Licensees allege that the Prong 2 and Prong 3 requirements are unconstitutional and beyond the FCC's statutory authority.²⁵³ Neither party provides any basis for their assertions, however, and we are unable to find any.²⁵⁴

V. THIRD NOTICE OF PROPOSED RULE MAKING

182. The EEO rules apply to all "full-time employees," defined as those whose regular work schedule is 30 hours or more a week. We have previously applied a "substantial compliance" policy to positions involving less than 30 hours a week, although we did not require reporting of this effort and did not focus on part-time hires in our review of EEO programs. As discussed above, we do not have sufficient evidence in the current record to make an informed decision about whether and how to apply the new EEO rules and policies to part-time positions, defined as less than 30 hours per week.²⁵⁵ We are thus seeking comment on this issue. In particular, we seek comment on how many and what types of positions in the broadcast and MVPD industries fall into this category, what is the significance of these

²⁵² StBAs Reply Comments at 9-12.

²⁵³ LTVG Comments at 34; Radio Licensees Comments at 6.

²⁵⁴ We note that we have concluded in the past that disclosure requirements promote First Amendment interests by increasing the flow of information to the public. See, e.g., *Policies and Rules Concerning Children's Television Programming*, 11 F.C.C. Rcd 10660, 10684 (1996). See also *Meese v. Keene*, 481 U.S. 465 (1987) (upholding film labeling requirements under First Amendment).

²⁵⁵ See ¶ 104, *supra*.

positions in terms of entry into broadcasting, how burdensome compliance with the recruitment, record-keeping, and reporting requirements for all or some part-time positions would be for broadcasters and MVPDs, and whether the requirements applicable to part-time positions should be the same as or different from those applicable to full-time positions. We also seek comment on whether we should set a minimum number of hours for a part-time position to be covered by the rules and, if so, what that minimum should be.

VI. CONCLUSION

183. In this *Second Report and Order and Third Notice of Proposed Rule Making*, we adopt a new broadcast EEO Rule and set of policies, and we amend our MVPD EEO rules and policies. We remain committed both to prohibiting discrimination in employment and requiring broad and inclusive outreach in recruitment by broadcasters and cable entities.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

184. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Second NPRM*. The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, a Final Regulatory Flexibility Analysis ("FRFA") is contained in Appendix B.

185. *Paperwork Reduction Act of 1995 Analysis.* The actions herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to, and become effective upon, approval by the Office of Management and Budget as prescribed by the Act.

186. *Ex Parte Rules.* With respect to the *Third Notice of Proposed Rule Making (Third NPRM)*, this is a permit-but-disclose notice and comment proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 CFR Sections 1.1202, 1.1203, and 1.1206(a).

187. *Initial Regulatory Flexibility Analysis.* With respect to the *Third NPRM*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in the Appendix hereto. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the possible significant economic impact on small entities of the proposals contained in this *Third NPRM*.²⁵⁶ Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Third NPRM*, but they must have a distinct heading designating them as responses to the IRFA.

188. *Comments and Reply Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 20, 2002, and reply comments on or before January 6, 2003. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

²⁵⁶ See 5 U.S.C. § 603.

189. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554.

190. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room, 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number in this case, MM Docket No. 98-204), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554.

191. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 Twelfth Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0270, (202) 418-2555 TTY, or bcline@fcc.gov.

192. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or bmillin@fcc.gov.

193. *Initial Paperwork Reduction Act of 1995 Analysis.* This *Third NPRM* contains either a proposed or modified information collection in that part-time hires could potentially be subject to information collection requirements. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second NPRM*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Third NPRM*; OMB comments are due 60 days from the date of publication of this *Third NPRM* in the Federal Register. Comments should address: (a) whether the potential collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted

to Judy Boley, Federal Communications Commission, Room 1-C804, 445 Twelfth Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to Edward.Springer@omb.eop.gov.

194. *Authority.* This *Third NPRM* is issued pursuant to authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

195. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554, this *Second Report and Order and Third Notice of Proposed Rule Making* IS ADOPTED, and Part 73 and Part 76 of the Commission's Rules ARE AMENDED as set forth in attached Appendix C. It is our intention in adopting these rule changes that, if any provision of the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of the rules not deemed unlawful and the application of such rules to other persons or circumstances shall remain in effect to the fullest extent permitted by law.

196. IT IS FURTHER ORDERED that the late-filed comments and reply comments in this proceeding are considered as part of the record in this proceeding.

197. IT IS FURTHER ORDERED that, pursuant to the Congressional Review Act, the new rules and amendments set forth in Appendix C WILL BECOME EFFECTIVE either 60 days after their publication in the Federal Register or upon receipt by Congress of a report in compliance with the Congressional Review Act, 5 U.S.C. § 801, whichever is later, and the information collection contained in these rules will become effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise. We will not require television broadcast licensees to file EEO mid-term reports in 2003.

198. Upon the effective date of the rules adopted herein, our action suspending certain of our former rules in *Suspension of the Broadcast and Cable Equal Employment Opportunity Outreach Program Requirements*, 16 FCC Rcd 2872 (2001) (*Suspension Order*) WILL BE VACATED, except that Sections 73.3612 of the Commission's Rules, 47 C.F.R. § 73.3612 (Annual Employment Report) and 76.1802 of the Commission's Rules, 47 C.F.R. § 76.1802 (Equal Employment Opportunity) will remain suspended in accordance with the terms of the *Suspension Order* pending further action on workforce data collection issues, as discussed above.

199. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order and Third Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

200. IT IS FURTHER ORDERED that MM Docket No. 98-204 will remain open for the limited purpose of considering the issues raised in the *Third Notice of Proposed Rule Making*, as discussed above, and to facilitate any additional proceedings upon further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**APPENDIX A
LIST OF COMMENTING PARTIES**

Comments

1. American Cable Association (ACA)
2. American Federation of Television and Radio Artists (AFTRA)
3. American Women in Radio and Television, Inc. (AWRT)
4. Association of America's Public Television Stations (APTS)
5. Walt Baker
6. Joseph Belisle
7. Broadcast Compliance Services
8. John Bronikowski
9. Cox Communications, Inc. (Cox)
10. Curators of the University of Missouri (University)
11. Fletcher, Heald & Hildreth, P.L.C. (FH&H)
12. Golden Orange Broadcasting, Inc. (Golden Orange)
13. Lawyer's Committee for Civil Rights Under Law, et al. and People for the American Way Foundation (LCCR and PFAWF)
14. Local Television Group (LTVG)
15. Media Captioning Services (MCS)
16. Mesquite Independent School District (MISD)
17. Minority Media and Telecommunications Council, et al. (MMTC)
Office of Communication of the United Church of Christ, Inc.,
African American Media Incubator, AFTRA, Alliance for Community Media,
Alliance for Public Technology, American Civil Liberties Union, American
Hispanic Owned Radio Association, American Indians in Film, Asian
American Journalists Association, Asian American Media Development, Inc.,
Black Citizens for a Fair Media, Black College Communication Association,
Black Entertainment and Sports Lawyers Association, Black Entertainment
and Telecommunications Association, Civil Rights Forum on Communications
Policy, Cleveland Talk Radio Consortium, Cultural Environment Movement,
Fairness and Accuracy in Reporting, League of United Latin American
Citizens, Minorities in Communications Division of the Association for
For Education in Journalism and Communications, Minority Business
Enterprise Legal Defense and Education Fund, NAMIC, Inc.,
(National Association of Minorities in Communications), National Asian
American Telecommunications Association, National Asian Pacific American
Legal Consortium, National Association for the Advancement of Colored
People, National Association of Black Journalists, National Association of
Black Owned Broadcasters, National Association of Black Telecommunications
Professionals, National Association of Hispanic Journalists, National
Association of Hispanic Publications, National Bar Association, National
Association of Hispanic Organizations, National Council of La Raza,
National Council of the Churches of Christ in the United States, National
Hispanic Foundation for the Arts, National Hispanic Media Coalition,
National Indian Telecommunications Institute, National Latino
Telecommunications Institute, National Latino Telecommunications
Taskforce, National Newspaper Publishers Association, National Urban
League, Native American Journalists Association, Native American
Public Telecommunications, Puerto Rican Legal Defense & Education Fund,

**San Diego Community Broadcasting School, Inc., Telecommunications
Research and Action Center, UNITY: Journalists of Color, Inc., Women's
Institute for Freedom of the Press**

- 18. National Association of Broadcasters (NAB)**
- 19. National Association for the Advancement of Colored People (NAACP)**
- 20. National Cable & Telecommunications Association (NCTA)**
- 21. National Public Radio (NPR)**
- 22. National Religious Broadcasters (NRB)**
- 23. NOW, et al.**
- 24. Russell Oasis**
- 25. Radio One, Inc. (Radio One)**
- 26. State Broadcasters Associations (broadcast associations in 49 states and
the District of Columbia and Puerto Rico) (StBAs)**
- 27. State University of New York**
- 28. School Board of Broward County, Florida (Broward)**
- 29. Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting
Network (TBN)**
- 30. Various Radio Licensees**
- 31. Doreen Vincent (Ability Today, Inc.)**

Reply Comments

1. American Cable Association (ACA)
2. American Women in Radio and Television, Inc. (AWRT)
3. Named State Broadcasters Associations (49 States, the District of Columbia and Puerto Rico) (StBAs)
4. The Lutheran Church-Missouri Synod (Lutheran Church)
5. Minority Media & Telecommunications Council, et al. (MMTC)
6. National Association of Broadcasters (NAB)
7. National Cable Television Association (NCTA)
8. North Carolina Association of Broadcasters (NCAB)
9. NOW, et al. (National Organization for Women, NOW Legal Defense and Educational Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, Women's Institute for Freedom of the Press)

EEO En Banc Hearing Commenters

1. Ann Arnold, Executive Director, Texas State Broadcasters Association
2. Tom Baxter, President, Time Warner Cable, AOL/TW
3. Linda Berg, Political Director, National Organization for Women
4. Reverend Robert Chase, Executive Director, Office of Communications, United Church of Christ
5. Belva Davis, Special Projects Reporter, KQED-TV, San Francisco, CA
6. Joan E. Gerberding, President, American Women in Radio and Television
7. Gregory Hessinger, National Executive Director, American Federation of Radio and Television Artists
8. Catherine Hughes, Chief Executive Officer, Radio One, Inc.
9. Michael Jack, President and General Manager, WRC-TV
10. Marilyn Kushak, Vice President, Midwest Family Broadcasters
11. Hugh Price, President and Chief Executive Officer, National Urban League
12. Ester Renteria, President, Hispanic Americans for Fairness in Media
13. Henry Rivera, Former FCC Commissioner, Partner at Shook, Hardy & Bacon
14. Art Torres, President, Walter Kaitz Foundation
15. Charles Warfield, President and Chief Operating Officer, ICBC Broadcasting Holdings, Inc.
16. Steve White, Senior Vice President, AT &T Broadband

APPENDIX B

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Second Notice of Proposed Rule Making (Second NPRM)* in this proceeding.² The Commission sought written public comments on the possible significant economic impact of the proposed policies and rules on small entities in the *Second NPRM*, including comments on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Proposed Rule Changes:

This *Second Report and Order and Third Notice of Proposed Rule Making (Second Report and Order)* adopts new equal employment opportunity (EEO) rules and policies for broadcasters and multi-channel video program distributors (MVPDs) consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) (*Association*). The Court therein found unconstitutional one of two options for achieving broad outreach provided by the broadcast EEO outreach requirements adopted in the *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2329 (2000) (*Report and Order*), *recon. denied*, 15 FCC Rcd 22548 (2000), and codified as Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080. The Court found the option invalid because it found that nonminority job applicants were less likely to receive notification of job openings under that recruitment option. The Court further found that the other option provided by the Rule, although not invalid, could not be severed from the one unconstitutional option and therefore it vacated the entire Rule.

B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA:

One comment was filed specifically in response to the IRFA. The American Cable Association (ACA) proposes the following relief for smaller MVPDs serving fewer than 15,000 subscribers or, in the alternative, employing ten or fewer employees: an exemption from the EEO outreach requirements, streamlined recordkeeping and reporting requirements, and a streamlined FCC Form 395-A (Cable Television Annual Employment Report). ACA states that for many smaller companies, compliance with EEO outreach, recordkeeping, and reporting requirements imposes substantial administrative burdens and costs. ACA also filed these same comments regarding small MVPDs in response to the *Second NPRM*. We note that the *Second Report and Order* considers ACA's concerns and, as discussed below, provides relief to small MVPD employment units.⁴

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policy*, 16 FCC Rcd 22843, 22862 (2001).

³ See 5 U.S.C. § 604.

⁴ See para. 177, *supra*.

C. Recording, Recordkeeping, and Other Compliance Requirements:

The purpose of this rulemaking is to replace our prior EEO rule that was found in part to be unconstitutional. Hence, the recording, recordkeeping, and compliance requirements of the new rule will not exceed those under the former rule. We note that the Small Business Administration (SBA) approved our approach for small broadcast stations and small MVPDs under our former rule.⁵ Generally, no special skills will be necessary to comply with the requirements.⁶

The *Second Report and Order* requires that broadcasters and MVPDs recruit for all full-time job vacancies except in exigent circumstances, that some EEO materials be kept in the public inspection file, and that all broadcasters and MVPDs adhere to the EEO rules' general anti-discrimination provisions.

In addition, broadcasters and MVPDs must undertake two additional recruitment measures. The first recruitment measure requires broadcasters and MVPDs to provide notification of full-time job vacancies to any requesting organization if the organization is involved in assisting job seekers. Depending on the size or location of a station's staff, the second recruitment measure requires broadcasters to engage in at least four (for station employment units with more than ten full-time employees in larger markets) or two (for station employment units with five to ten full-time employees or if they are located in a small market) of the following menu options every two years: participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions; hosting of at least one job fair; co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities; participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues (including conventions, career days, workshops, and similar activities); establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment; participation in job banks, Internet programs, and other programs designed to promote outreach generally; participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting; establishment of training and mentoring programs designed to enable station personnel to acquire skills that could qualify them for higher level positions; participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting; sponsorship of at least two events in the community designed to inform members of the public as to employment opportunities in broadcasting; listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities; providing assistance to outside non-profit entities in the maintenance of web sites that provide counseling on the process of searching for broadcast employment and/or other career development assistance pertinent to broadcasting; providing training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination; providing training to personnel of outside organizations interested in broadcast employment opportunities that would enable them to better refer job candidates for broadcast positions; and participation in other activities designed by the station employment unit to further the goal of disseminating information about employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities. MVPD units in larger markets with more than ten full-time employees engage in at least two options from the recruitment measures menu every year and MVPD units with six to ten full-time employees or those

⁵ Letter from Aida Alvarez, Administrator, U.S. Small Business Administration, to Roy Stewart, Chief, Mass Media Bureau, Federal Communications Commission (January 19, 2000).

⁶ These requirements are described more fully in the text of the *Second Report and Order*, *supra*, and will be codified at 47 C.F.R. § 73.2080 (broadcasting) and 47 C.F.R. §§ 76.75, 76.77, and 76.1702 (MVPDs).

located in small markets engage in at least one option every year.

Also, broadcasters and MVPDs must retain records to demonstrate that they have recruited for all full-time permanent positions. Such recordkeeping includes: listings of all full-time vacancies filled, listings of recruitment sources, the address/contact person/telephone number of each recruitment source, dated copies of advertisements and other documentation announcing vacancies, listings of those organizations which requested notification of vacancies, the total number of interviewees for each vacancy, the date and recruitment source of each hire, the number of interviewees referred by each recruitment source, and documentation showing proof of participation in menu options. Broadcasters' records must be maintained until grant of the renewal application for the term during which the hiring activity occurred. MVPDs would retain their records for a minimum of seven years. In order to lessen any burdens, records may be maintained in an electronic format, *e.g.*, by scanning pertinent documents into a computer format.

Stations and MVPDs must place annually the following EEO records in their local public inspection file: listings of full-time vacancies filled during the preceding year, recruitment sources used for each vacancy, the address/contact person/telephone number of each recruitment source, an indication of the organizations requesting notification, the total number of persons interviewed for full-time vacancies during the preceding year, the total number of interviewees referred by each recruitment source, a list of the recruitment source that referred each full-time hiree, and a brief description of the menu option items undertaken during the preceding year. Station units retain the materials in their file until final action has been taken on the station's next license renewal application, and cable entities retain their materials for a period of five years.

Most broadcasters must submit the contents of their station's EEO public inspection file to the FCC as part of their renewal application and midway through the license term for the Commission's mid-term review (for those subject to mid-term review), and MVPDs with six or more full-time employees submit copies of their EEO public inspection file to the Commission every five years. Broadcasters' submissions cover only the last two years of EEO activity. MVPDs' submissions cover only the last year of EEO activity. Broadcasters must post their current EEO public file report on their web site, if they have one.

Also, broadcasters subject to mid-term review must file Form 397 (Broadcast Mid-Term Report) and place a copy of the Report in the public inspection file. Broadcasters must also place a copy of Form 396 (Broadcast EEO Program Report) and Form 396-A (Broadcast Model EEO Program Report for the construction or sale of a station) in the public inspection file.

We also note that we have provided relief to broadcast and MVPD entities located in small markets. While this is not specifically a small entity relief, this action also lessens compliance burdens.

D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:

1. Definition of a "Small Business"

The new rules would apply to broadcast stations and MVPDs. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.⁷ Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.⁸ The RFA, 5 U.S.C. § 601(3), generally defines the term "small business"

⁷ 5 U.S.C. § 603(b)(3).

⁸ 5 U.S.C. § 601(6).

as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the [SBA] and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."⁹

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁰ Nationwide, as of 1992, there were approximately 275,801 small organizations.¹¹ Finally, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹² As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹³ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹⁴ The United States Bureau of the Census (Census Bureau) estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to

⁹ 5 U.S.C. § 601(3).

¹⁰ 5 U.S.C. § 601(4).

¹¹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹² 5 U.S.C. § 601(5).

¹³ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹⁴ *Id.*

considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms.¹⁵ The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.¹⁶ The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.¹⁷ Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules to be adopted pursuant to this *Report and Order* will apply to broadcast television and radio stations.¹⁸ The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business.¹⁹ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.²⁰ Included in this industry are commercial, religious, educational, and other television stations.²¹ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.²² Separate establishments primarily engaged in producing taped television program materials are classified under other North American Industry Classification (NAICS) numbers.²³

¹⁵ 13 C.F.R. § 121.104(d)(1).

¹⁶ 13 C.F.R. § 121.103(a)(1).

¹⁷ 13 C.F.R. § 121.103(a)(2).

¹⁸ While we believe that the SBA's definition of "small business" in this context greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the rules on small television and radio stations, for purposes of this FRFA, we include the SBA's definition in determining the number of small businesses to which the rules would apply.

¹⁹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513120.

²⁰ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

²¹ *Id.*; see Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, at NAICS code 513120.

²² 1992 Census, Series UC92-S-1, at Appendix A-9.

²³ *Id.*; formerly SIC code 7812 (Motion Picture and Video Tape Production) (NAICS code 512110); formerly SIC code 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs) (NAICS codes 512110, 512191, 512290).

There were 1,695 full-service television stations operating as of December 2001.²⁴ According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.²⁵ Of this total, 734 firms had annual receipts of \$9,999,999.00 or less and an additional 71 had receipts of \$10 million to \$24,999,999.00.²⁶ Thus, under this standard, the majority of firms can be considered small.

The SBA defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.²⁷ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.²⁸ Included in this industry are commercial, religious, educational, and other radio stations.²⁹ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.³⁰ However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.³¹ According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.³² Of this total 4,265 had annual receipts of \$4,999,999.00 or less, and an additional 103 firms had receipts of \$5 million to \$9,999,999.00.³³ Thus, under this standard, the great majority of firms can be considered small.

The *Second Report and Order* also amends EEO rules applicable to MVPDs. SBA has developed a definition of a small entity for cable and other program distribution, which includes all such companies generating \$12.5 million or less in annual receipts.³⁴ This definition includes direct broadcast satellite services (DBS), multipoint distribution systems (MDS), and local multipoint distribution service (LMDS). According to Census Bureau data for 1997, there were 1,311 firms within the industry category Cable and Other Program Distribution, total, that operated for the entire year.³⁵ Of this total, 1,180 firms had annual receipts of \$9,999,999.00 or less, and an additional 52 firms had receipts of \$10 million to \$24,999,999.00.³⁶ Thus, under this standard, the majority of firms can be considered small. Below we

²⁴ FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002).

²⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513120 (issued Oct. 2000).

²⁶ *Id.* The census data do not provide a more precise estimate.

²⁷ 13 C.F.R. § 121.201, NAICS codes 513111 and 513112.

²⁸ 1992 Census, Series UC92-S-1, at Appendix A-9.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513220 (issued Oct. 2000).

³³ *Id.* The census data do not provide a more precise estimate.

³⁴ 13 C.F.R. § 121.201 (NAICS codes 513210 and 513220).

³⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513220 (issued Oct. 2000).

³⁶ *Id.* The census data do not provide a more precise estimate.

discuss these services to provide a more succinct estimate of small entities.

Cable Systems: The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.³⁷ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.³⁸ Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds \$250,000,000."³⁹ The Commission has determined that there are 67,700,000 subscribers in the United States.⁴⁰ Therefore, we found that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.⁴¹ Based on available data, we find that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.⁴² Since we do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS: MDS involves a variety of transmitters, which are used to relay programming to the home or office.⁴³ The Commission has defined "small entity" for purposes of the 1996 auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁴⁴ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴⁵ These stations were licensed prior to implementation of Section 309(j) of the

³⁷ 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995).

³⁸ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

³⁹ 47 U.S.C. § 543(m)(2).

⁴⁰ FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (January 24, 2001).

⁴¹ 47 C.F.R. § 76.1403(b) (SIC 4833).

⁴² Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁴³ For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

⁴⁴ 47 C.F.R. § 1.2110(a)(1).

⁴⁵ See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253,

Communications Act of 1934, as amended.⁴⁶ Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.⁴⁷ The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business.

LMDS: The auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined “small entity” for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁴⁸ An additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴⁹ These regulations defining “small entity” in the context of LMDS auctions have been approved by the SBA.⁵⁰ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission reaucted 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the reauction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

DBS: Because DBS provides subscription services, it falls within the SBA-recognized definition of “Cable and Other Program Distribution.”⁵¹ This definition provides that a small entity is one with \$12.5 million or less in annual receipts.⁵² Currently, there are nine DBS authorizations, though there are only two DBS companies in operation at this time. We neither request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would be considered a small business under the SBA definition.

An alternative way to classify small entities is by the number of employees. Based on available data, we estimate that in 1997 the total number of full-service broadcast stations with four or fewer employees was 5186, of which 340 were television stations.⁵³ Similarly, we estimate that in 1997, 1900 cable employment units employed fewer than six full-time employees. Also, in 1997, 296 “MVPD” employment units

Report and Order, 10 FCC Rcd 9589 (1995).

⁴⁶ 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA’s small business size standard for “other telecommunications” (annual receipts of \$11 million or less). See 13 C.F.R. § 121.201.

⁴⁷ *Id.* A BTA is the geographic area by which the MDS is licensed. See Rand McNally, 1992 *Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

⁴⁸ See *Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

⁴⁹ *Id.*

⁵⁰ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (January 6, 1998).

⁵¹ 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

⁵² *Id.*

⁵³ We base these estimates on a compilation performed by the Equal Employment Opportunity staff, Policy Division, Media Bureau, FCC.

employed fewer than six full-time employees.⁵⁴ We also estimate that in 1997, the total number of full-service broadcast stations with five to ten employees was 2145, of which 200 were television stations. Similarly, we estimate that in 1997, 322 cable employment units employed six to ten full-time employees. Also, in 1997, approximately 65 MVPD employment units employed six to ten full-time employees.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵⁵

This *Second Report and Order* sets forth the Commission's new EEO rules and procedures, and considers the significant alternatives presented in the comments. We have determined that our finalized rules fulfill our public interest goals while maintaining minimal regulatory burdens and ease and clarity of administration.

The Second NPRM proposed to exempt small staff stations from specific EEO recordkeeping and reporting requirements as had been the case under our previous EEO Rule. Under our former EEO Rule, station employment units with fewer than five full-time employees were exempt from the Rule's outreach provisions; station employment units with five to ten full-time employees performed only two, rather than four, menu options every two years; and radio station employment units with five to ten full-time employees were exempt from the mid-term review requirement. In addition, MVPD employment units employing six to ten full-time employees performed only one menu option each year as opposed to the two options required otherwise. MVPDs with fewer than six full-time employees were not required to demonstrate compliance with the EEO program requirements. The *Second Report and Order* adopts this same relief. Thus, the EEO Rule does not impose unreasonable burdens on small broadcasters or MVPDs.

We provide this relief because entities with small staffs have limited personnel and financial resources to carry out EEO requirements. The exception for small businesses provides them with some relief of any recordkeeping and reporting costs. We believe that the relief to small broadcasters and MVPDs balances the importance of deterring discrimination and achieving broad outreach in broadcast and MVPD employment practices against the need to maintain minimal regulatory burdens.

The *Second NPRM* asked whether the Commission should increase the number of employees below which broadcasters would be exempt from the EEO outreach requirements to include employment units with ten or fewer employees. We also asked whether to increase the threshold for the lesser number of menu options, or permit the lesser number for stations in smaller markets.⁵⁶ As noted, we received one comment directly in response to the IRFA. In addition, we received a few general comments that are pertinent. As discussed in the *Second Report and Order*, the National Association of Broadcasters (NAB)

⁵⁴ At that time, we considered "MVPDs" to be all multichannel video programming distributors that were not cable operators.

⁵⁵ 5 U.S.C. § 603(c).

⁵⁶ *Second NPRM*, para. 29, 48

supports exempting stations with fewer than ten full-time employees. NAB explains that such stations face unique obstacles in complying with our Rule because of a lack of personnel and resources, difficulties in competing with larger stations, and a lack of access to resources necessary to implement menu options. NAB also contends that stations in smaller markets face difficulties similar to those facing stations with fewer than ten full-time employees.⁵⁷ The Association of Public Television Stations supports an exemption from the EEO Rule for stations with ten or fewer employees because of the funding problems of small public television stations, especially those outside of top 100 markets, and difficulties experienced in attracting and retaining minority employees.⁵⁸ The Local Television Group (LTVG) asks the Commission to exempt stations with fewer than 100 employees, in order to parallel Equal Employment Opportunity Commission rules.⁵⁹ Minority Media and Telecommunications Council (MMTC), the National Organization for Women (NOW), American Women in Radio and Television (AWRT), the National Association for the Advancement of Colored People (NAACP), and the Lawyers' Committee for Civil Rights Under Law oppose an increase in the exemptions, citing primarily the opportunity for entry into the industry provided by small stations.⁶⁰

The ACA asks for an exemption from the EEO outreach requirements, streamlined recordkeeping and reporting requirements, and a streamlined FCC Form 395-A (Cable Television Annual Employment Report) for cable systems with fewer than 15,000 subscribers or, in the alternative, employing ten or fewer employees.⁶¹ ACA explains that the Commission previously provided relief to systems with fewer than 15,000 subscribers in the context of rate regulation, and that compliance with EEO outreach and recordkeeping imposes substantial administrative burdens for smaller cable companies.⁶²

Fletcher Heald & Hildreth, P.L.C. (FH&H) requests that the Commission adopt a policy that when an owner has a controlling interest (20% or greater voting control) in a licensee, he or she would not be considered a station employee for purposes of the EEO Rule, even if he or she in fact worked at the station.⁶³

We recognize that smaller markets may not have the resources in the community to support many of the required menu options. Accordingly, the EEO Rule adopted in the *Second Report and Order* provides that small market systems will be permitted to perform only two, rather than four, menu options during a two-year period.

The EEO Rule also will not consider owners holding a 20% or greater voting interest in a licensee as station employees for EEO purposes. This policy could assist small operators by reducing the number of

⁵⁷ NAB Comments at 54-58.

⁵⁸ Association of Public Television Stations Comments at 8-9.

⁵⁹ LTVG Comments at 33.

⁶⁰ MMTC Comments at 97-100; NOW Comments at 22-27; AWRT Comments at 17-18; NAACP Comments at 2-3; Lawyers' Committee for Civil Rights Under Law Comments at 5.

⁶¹ ACA Comments and IRFA Comments.

⁶² *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393 (1995).

⁶³ FH&H Comments.

full-time employees an entity would have when assessing its eligibility for a small entity exemption or other small business relief.

We find no basis in the record to provide any additional exemptions from our Rule. Generalized claims as to the alleged burdens by commenters are unsupported by evidence. Thus, the Rule we are adopting today does not impose unreasonable burdens on small entities. Nor does the Rule impose hardships comparable to those involved in rate regulation. Further, as we found in the *Report and Order*, small entities provide much needed entry-level employment opportunities in the industry.

With respect to streamlining reporting/recordkeeping requirements, we will replace Form 395-A with a new form, the FCC Form 396-C. As discussed in the *Second Report and Order*, MVPD compliance with the EEO Rule's requirements is monitored pursuant to annual reports filed by MVPDs which must be placed in an entity's public file. The Form 396-C requires information concerning the entity's EEO outreach program and not its workforce. We will consider the adoption of a new form eliciting workforce data in a future Report and Order.

In order to lessen any burdens, the *Second Report and Order* does not require the retention of records of the recruitment sources of applicants as this may require additional efforts to contact applicants who did not provide the information in the application. Also, records may be conveniently maintained in an electronic format, *e.g.*, by scanning pertinent documents into a computer format.

Report to Congress: The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A). In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Second Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

APPENDIX C

I. Part 73 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:**Subpart H - Rules Applicable to All Broadcast Stations**

Section 73.2080 is amended to delete the present language in its entirety and replace it with the following:

§ 73.2080. Equal employment opportunities (“EEO”).

(a) *General EEO policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, Class A TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex. Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees. However, they cannot discriminate on the basis of race, color, national origin or gender from among those who share their religious affiliation or belief. For purposes of this rule, a religious broadcaster is a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.

(b) *General EEO program requirements.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) *Specific EEO program requirements.* Under the terms of its program, a station employment unit must:

(1) Recruit for every full-time job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Religious radio broadcasters who establish religious affiliation as a qualification for a job position are not required to comply with these recruitment requirements with respect to that job position or positions, but will be expected to make reasonable, good

faith efforts to recruit applicants who are qualified based on their religious affiliation. Nothing in this section shall be interpreted to require a broadcaster to grant preferential treatment to any individual or group based on race, color, national origin, religion, or gender.

(i) A station employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to such recruitment sources, a station employment unit shall provide notification of each full-time vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the station employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least four (if the station employment unit has more than ten full-time employees and is not located in a smaller market) or two (if it has five to ten full-time employees and/or is located entirely in a smaller market) of the following initiatives during each two-year period beginning with the date stations in the station employment unit are required to file renewal applications, or the second, fourth or sixth anniversaries of that date.

(i) participation in at least four job fairs by station personnel who have substantial responsibility in the making of hiring decisions;

(ii) hosting of at least one job fair;

(iii) co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;

(iv) participation in at least four events sponsored by organizations representing groups present in the community interested in broadcast employment issues, including conventions, career days, workshops, and similar activities;

(v) establishment of an internship program designed to assist members of the community to acquire skills needed for broadcast employment;

(vi) participation in job banks, Internet programs, and other programs designed to promote outreach generally (*i.e.*, that are not primarily directed to providing notification of specific job vacancies);

(vii) participation in scholarship programs designed to assist students interested in pursuing a career in broadcasting;

(viii) establishment of training programs designed to enable station personnel to acquire skills that could qualify them for higher level positions;

(ix) establishment of a mentoring program for station personnel;

(x) participation in at least four events or programs sponsored by educational institutions relating to career opportunities in broadcasting;

(xi) sponsorship of at least two events in the community designed to inform and educate members of the public as to employment opportunities in broadcasting;

(xii) listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;

(xiii) provision of assistance to unaffiliated non-profit entities in the maintenance of web sites that provide counseling on the process of searching for broadcast employment and/or other career development assistance pertinent to broadcasting;

(xiv) provision of training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination;

(xv) provision of training to personnel of unaffiliated non-profit organizations interested in broadcast employment opportunities that would enable them to better refer job candidates for broadcast positions;

(xvi) participation in other activities designed by the station employment unit reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to job candidates who might otherwise be unaware of such opportunities.

(3) Analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach to potential applicants, and address any problems found as a result of its analysis.

(4) Periodically analyze measures taken to:

(i) Disseminate the station's equal employment opportunity program to job applicants and employees;

(ii) Review seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examine rates of pay and fringe benefits for employees having the same duties, and eliminate any inequities based upon race, national origin, color, religion, or sex discrimination;

(iv) Utilize media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion or sex over another;

(v) Ensure that promotions to positions of greater responsibility are made in a nondiscriminatory manner;

(vi) Where union agreements exist, cooperate with the union or unions in the development of programs to ensure all persons of equal opportunity for employment, irrespective of race, national origin, color, religion, or sex, and include an effective nondiscrimination clause in new or renegotiated union agreements; and

(vii) Avoid the use of selection techniques or tests that have the effect of discriminating against any person based on race, national origin, color, religion, or sex.

(5) Retain records to document that it has satisfied the requirements of paragraphs (c)(1) and (2) of this section. Such records, which may be maintained in an electronic format, shall be retained until after grant of the renewal application for the term during which the vacancy was filled or the initiative occurred. Such records need not be submitted to the FCC unless specifically requested. The following records shall be maintained:

(i) listings of all full-time job vacancies filled by the station employment unit, identified by job title;

(ii) for each such vacancy, the recruitment sources utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) dated copies of all advertisements, bulletins, letters, faxes, e-mails, or other communications announcing vacancies;

(iv) documentation necessary to demonstrate performance of the initiatives required by paragraph (c)(2) of this section, including sufficient information to fully disclose the nature of the initiative and the scope of the station's participation, including the station personnel involved;

(v) the total number of interviewees for each vacancy and the referral source for each interviewee; and

(vi) the date each vacancy was filled and the recruitment source that referred the hiree.

(6) Annually, on the anniversary of the date a station is due to file its renewal application, the station shall place in its public file, maintained pursuant to § 73.3526 or § 73.3527, and on its web site, if it has one, an EEO public file report containing the following information (although if any broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the twelve months covered by the EEO public file report, its EEO public file report shall cover the period starting with the date it acquired the station):

(i) a list of all full-time vacancies filled by the station's employment unit during the preceding year, identified by job title;

(ii) for each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to paragraph (c)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(iii) the recruitment source that referred the hiree for each full-time vacancy during the preceding year;

(iv) data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and

(v) a list and brief description of initiatives undertaken pursuant to paragraph (c)(2) of this section during the preceding year.

(d) *Small Station Exemption.* The provisions of paragraphs (b) and (c) of this section shall not apply to station employment units that have fewer than five full-time employees.

(e) *Definitions.* For the purposes of this Rule:

(1) a full-time employee is a permanent employee whose regular work schedule is 30 hours per week or more.

(2) a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

(3) a smaller market includes metropolitan areas as defined by the Office of Management and Budget with a population of fewer than 250,000 persons and areas outside of all metropolitan areas as defined by the Office of Management and Budget.

(f) *Enforcement.* The following provisions apply to employment activity concerning full-time positions at each broadcast station employment unit (defined in this part) employing five or more persons in full-time positions, except where noted.

(1) All broadcast stations, including those that are part of an employment unit with fewer than five full-time employees, shall file a Broadcast Equal Employment Opportunity Program Report (Form 396) with their renewal application. Form 396 is filed on the date the station is due to file its application for renewal of license. If a broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the period that is to form the basis for the Form 396, information provided on its Form 396 should cover the licensee's EEO recruitment activity during the period starting with the date it acquired the station. Stations are required to maintain a copy of their Form 396 in the station's public file in accordance with the provisions of §§ 73.3526 and 73.3527.

(2) The Commission will conduct a mid-term review of the employment practices of each broadcast television station and each radio station that is part of an employment unit of more than ten full-time employees four years following the station's most recent license expiration date as specified in § 73.1020. Each such licensee is required to file with the Commission the Broadcast Mid-Term Report (FCC Form 397) four months prior to that date. If a broadcast licensee acquires a station pursuant to FCC Form 314 or FCC Form 315 during the period that is to form the basis for the Form 397, its Report should cover the licensee's EEO recruitment activity during the period starting with the date it acquired the station.

(3) If a station is subject to a time brokerage agreement, the licensee shall file Forms 396, Forms 397, and EEO public file reports concerning only its own recruitment activity. If a licensee is a broker of another station or stations, the licensee-broker shall include its recruitment activity for the brokered station(s) in determining the bases of Forms 396, Forms 397 and the EEO public file reports for its own station. If a licensee-broker owns more than one station, it shall include its recruitment activity for the brokered station in the Forms 396, Forms 397, and EEO public file reports filed for its own station that is most closely affiliated with, and in the same market as, the brokered station. If a licensee-broker does not own a station in the same market as the brokered station, then it shall include its recruitment activity for the brokered station in the Forms 396, Forms 397, and EEO public file reports filed for its own station that is geographically closest to the brokered station.

(4) Broadcast stations subject to this section shall maintain records of their recruitment activity necessary to demonstrate that they are in compliance with the EEO Rule. Stations shall ensure that they

maintain records sufficient to verify the accuracy of information provided in Forms 396, Forms 397, and EEO public file reports. To determine compliance with the EEO Rule, the Commission may conduct inquiries of licensees at random or if it has evidence of a possible violation of the EEO Rule. In addition, the Commission will conduct random audits. Specifically, each year approximately five percent of all licensees in the television and radio services will be randomly selected for audit, ensuring that, even though the number of radio licensees is significantly larger than television licensees, both services are represented in the audit process. Upon request, stations shall make records available to the Commission for its review.

(5) The public may file complaints throughout the license term based on a station's Form 397 or the contents of a station's public file. Provisions concerning filing, withdrawing, or non-filing of informal objections or petitions to deny license renewal, assignment, or transfer applications are delineated in §§ 73.3584 and 73.3587-3589 of the Commission's Rules.

(g) *Sanctions and Remedies.* The Commission may issue appropriate sanctions and remedies for any violation of this Rule.

II. Part 76 of Chapter 1 of the Code of Federal Regulations is amended as follows:

Subpart E -- Equal Employment Opportunity Requirements

Section 76.75 is revised by amending paragraphs (b), (f); deleting existing paragraphs (g), (h), (i), (j) and (k); and adding new paragraphs (g), (h), (i) and (j):

§ 76.75 Specific EEO program requirements.

(b) Establish, maintain and carry out a positive continuing program of outreach activities designed to ensure equal opportunity and nondiscrimination in employment. The following activities shall be undertaken by each employment unit:

(1) Recruit for every full-time job vacancy in its operation. A job filled by an internal promotion is not considered a vacancy for which recruitment is necessary. Nothing in this section shall be interpreted to require a multichannel video programming distributor to grant preferential treatment to any individual or group based on race, national origin, color, religion, age, or gender.

(i) An employment unit shall use recruitment sources for each vacancy sufficient in its reasonable, good faith judgment to widely disseminate information concerning the vacancy.

(ii) In addition to using such recruitment sources, a multichannel video programming distributor employment unit shall provide notification of each full-time vacancy to any organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon request by such organization. To be entitled to notice of vacancies, the requesting organization must provide the multichannel video programming distributor employment unit with its name, mailing address, e-mail address (if applicable), telephone number, and contact person, and identify the category or categories of vacancies of which it requests notice. (An organization may request notice of all vacancies).

(2) Engage in at least two (if the unit has more than ten full-time employees and is not located in a smaller market) or one (if the unit has six to ten full-time employees and/or is located, in whole or in part, in a smaller market) of the following initiatives during each twelve-month period preceding the filing of an EEO program annual report:

(i) participation in at least two job fairs by unit personnel who have substantial responsibility in the making of hiring decisions;

- (ii) hosting of at least one job fair;
- (iii) co-sponsoring at least one job fair with organizations in the business and professional community whose membership includes substantial participation of women and minorities;
- (iv) participation in at least two events sponsored by organizations representing groups present in the community interested in multichannel video programming distributor employment issues, including conventions, career days, workshops, and similar activities;
- (v) establishment of an internship program designed to assist members of the community in acquiring skills needed for multichannel video programming distributor employment;
- (vi) participation in job banks, Internet programs, and other programs designed to promote outreach generally (*i.e.*, that are not primarily directed to providing notification of specific job vacancies);
- (vii) participation in a scholarship program designed to assist students interested in pursuing a career in multichannel video programming communications;
- (viii) establishment of training programs designed to enable unit personnel to acquire skills that could qualify them for higher level positions;
- (ix) establishment of a mentoring program for unit personnel;
- (x) participation in at least two events or programs sponsored by educational institutions relating to career opportunities in multichannel video programming communications;
- (xi) sponsorship of at least one event in the community designed to inform and educate members of the public as to employment opportunities in multichannel video programming communications;
- (xii) listing of each upper-level category opening in a job bank or newsletter of media trade groups whose membership includes substantial participation of women and minorities;
- (xiii) provision of assistance to unaffiliated non-profit entities in the maintenance of web sites that provide counseling on the process of searching for multichannel video programming employment and/or other career development assistance pertinent to multichannel video programming communications;
- (xiv) provision of training to management level personnel as to methods of ensuring equal employment opportunity and preventing discrimination;
- (xv) provision of training to personnel of unaffiliated non-profit organizations interested in multichannel video programming employment opportunities that would enable them to better refer job candidates for multichannel video programming positions;
- (xvi) participation in other activities reasonably calculated by the unit to further the goal of disseminating information as to employment opportunities in multichannel video programming to job candidates who might otherwise be unaware of such opportunities.

* * * * *

(f) A multichannel video programming distributor shall analyze its recruitment program on an ongoing basis to ensure that it is effective in achieving broad outreach, and address any problems found as a result of its analysis.

(g) Analyze on an ongoing basis its efforts to recruit, hire, promote and use services without discrimination on the basis of race, national origin, color, religion, age, or sex and explain any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

- (1) Where union agreements exist, cooperating with the union or unions in the development of programs to ensure all persons equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements;
- (2) Reviewing seniority practices to ensure that such practices are nondiscriminatory;
- (3) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race, national origin, color, religion, age, or sex discrimination;

(4) Evaluating the recruitment program to ensure that it is effective in achieving a broad outreach to potential applicants.

(5) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one race, national origin, color, religion, age, or sex over another; and

(6) Avoiding the use of selection techniques or tests that have the effect of discriminating against qualified minority groups or women.

(h) A full-time employee is a permanent employee whose regular work schedule is 30 hours per week or more.

(i) The provisions of paragraphs (b)(1)(ii), (b)(2), (c), and (f) of this section shall not apply to multichannel video programming distributor employment units that have fewer than six full-time employees.

(j) For the purposes of this Rule, a smaller market includes metropolitan areas as defined by the Office of Management and Budget with a population of fewer than 250,000 persons and areas outside of all metropolitan areas as defined by the Office of Management and Budget.

Section 76.77 is amended to read as follows:

§ 76.77 Reporting requirements and enforcement.

(a) *EEO program annual reports.* Information concerning a unit's compliance with the EEO recruitment requirements shall be filed by each employment unit with six or more full-time employees on FCC Form 396-C on or before September 30 of each year. If a multichannel video programming distributor acquires a unit during the twelve months covered by the EEO program annual report, the recruitment activity in the report shall cover the period starting with the date the entity acquired the unit.

(b) *Certification of Compliance.* The Commission will use the recruitment information submitted on a unit's EEO program annual report to determine whether the unit is in compliance with the provisions of this subpart. Units found to be in compliance with these rules will receive a Certificate of Compliance. Units found not to be in compliance will receive notice that they are not certified for a given year.

(c) *Investigations.* The Commission will investigate each unit at least once every five years. Employment units are required to submit supplemental investigation information with their regular EEO program annual reports in the years they are investigated. If an entity acquires a unit during the period covered by the supplemental investigation, the information submitted by the unit as part of the investigation shall cover the period starting with the date the operator acquired the unit. The supplemental investigation information shall include a copy of the unit's EEO public file report for the preceding year.

(d) *Records and inquiries.* Employment units subject to this subpart shall maintain records of their recruitment activity in accordance with §76.75 to demonstrate whether they are in compliance with the EEO rules. Units shall ensure that they maintain records sufficient to verify the accuracy of information provided in their EEO program annual reports and the supplemental investigation responses required by §76.1702 to be kept in a unit's public file. To determine compliance with the EEO rules, the Commission may conduct inquiries of employment units at random or if the Commission has evidence of a possible violation of the EEO rules. Upon request, employment units shall make records available to the Commission for its review.

(e) *Public complaints.* The public may file complaints based on EEO program annual reports, supplemental investigation information, or the contents of a unit's public file.

(f) *Sanctions and remedies.* The Commission may issue appropriate sanctions and remedies for any violation of the EEO rules.

Section 76.1702 is revised to read as follows in lieu of both versions of this Rule currently specified in the Code of Federal Regulations:

§ 76.1702 Equal employment opportunity.

(a) Every employment unit with six or more full-time employees shall maintain for public inspection a file containing copies of all EEO program annual reports filed with the Commission pursuant to §76.77 and the equal employment opportunity program information described in paragraph (b) of this section. These materials shall be placed in the unit's public inspection file annually by the date that the unit's EEO program annual report is due to be filed and shall be retained for a period of five years. The file shall be maintained at the central office and at every location with six or more full-time employees. A headquarters employment unit file and a file containing a consolidated set of all documents pertaining to the other employment units of a multichannel video programming distributor that operates multiple units shall be maintained at the central office of the headquarters employment unit. The multichannel video programming distributor shall provide reasonable accommodation at these locations for undisturbed inspection of its equal employment opportunity records by members of the public during regular business hours.

(b) The following equal employment opportunity program information shall be included annually in the unit's public file, and on the unit's web site, if it has one, at the time of the filing of its FCC Form 396-C:

(1) A list of all full-time vacancies filled by the multichannel video programming distributor employment unit during the preceding year, identified by job title;

(2) For each such vacancy, the recruitment source(s) utilized to fill the vacancy (including, if applicable, organizations entitled to notification pursuant to §76.75(b)(1)(ii) of this section, which should be separately identified), identified by name, address, contact person and telephone number;

(3) The recruitment source that referred the hiree for each full-time vacancy during the preceding year;


(4) Data reflecting the total number of persons interviewed for full-time vacancies during the preceding year and the total number of interviewees referred by each recruitment source utilized in connection with such vacancies; and

(5) A list and brief description of the initiatives undertaken pursuant to §76.75(b)(2) during the preceding year, if applicable.

Federal Communications Commission
Washington, D. C. 20554

NOT Approved by OMB
3060-0120

**BROADCAST EQUAL EMPLOYMENT OPPORTUNITY
MODEL PROGRAM REPORT**

Legal Name of the Applicant		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

☐ Application for Construction Permit for New Station ☐ Application for Assignment of License

☐ Application for Transfer of Control

a. Service Type: ☐ AM ☐ FM ☐ TV ☐ Other (specify)

b. Community of License:

City	State
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INSTRUCTIONS

Applicants seeking authority to construct a new commercial, noncommercial or international broadcast station, applicants seeking authority to obtain assignment of the construction permit or license of such a station, and applicants seeking authority to acquire control of an entity holding such construction permit or license are required to afford equal employment opportunity to all qualified persons and to refrain from discrimination in employment and related benefits on the basis of race, color, religion, national origin or sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, an applicant who proposes to employ five or more full-time employees must establish a program designed to ensure equal employment opportunity. This is submitted to the Commission as the Model EEO Program. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Guidelines for a Model EEO Program and a Model EEO Program are attached.

NOTE: Check appropriate box, sign the certification below and return to FCC:

Station employment unit will employ fewer than 5 full-time employees; therefore no written program is being submitted.

Station employment unit will employ 5 or more full-time employees. Our Model EEO Program is attached. (You must complete all sections of this form.)

I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed	Name of Respondent
Title	Date

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT
(U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

FCC 396-A
October 2002

GUIDELINES TO THE MODEL EEO PROGRAM

The model EEO program adopted by the Commission for construction permit applicants, assignees, and transferees contains five sections designed to assist the applicant in establishing an effective EEO program for its station. The specific elements which should be addressed are as follows:

I. GENERAL POLICY

The first section of the program should contain a statement by the applicant that it will afford equal employment opportunity in all personnel actions without regard to race, color, religion, national origin or sex, and that it has adopted an EEO program which is designed to fully utilize the skills of qualified persons.

II. RESPONSIBILITY FOR IMPLEMENTATION

This section calls for the name (if known) and title of the official who will be designated by the applicant to have responsibility for implementing the station's program.

III. POLICY DISSEMINATION

The purpose of this section is to disclose the manner in which the station's EEO policy will be communicated to employees and prospective employees. The applicant's program should indicate whether it: (a) intends to utilize an employment application form which contains a notice informing job applicants that discrimination is prohibited and that persons who believe that they have been discriminated against may notify appropriate governmental agencies; (b) will post a notice which informs job applicants and employees that the applicant is an equal opportunity employer and that they may notify appropriate governmental authorities if they believe that they have been discriminated against; and (c) will seek the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and in the inclusion of nondiscrimination provisions in union contracts. The applicant should also set forth any other methods it proposes to utilize in conveying its EEO policy (e.g., orientation materials, on-air announcements, station newsletter) to employees and prospective employees.

V. RECRUITMENT

The applicant should specify the recruitment sources and other techniques it proposes to use to attract qualified job applicants. The purpose of the listing is to assist the applicant in developing specialized referral sources to ensure wide dissemination of vacancy information as job opportunities occur. Sources which subsequently prove to be nonproductive should not be relied on and new sources should be sought.

MODEL EQUAL EMPLOYMENT OPPORTUNITY PROGRAM**I. GENERAL POLICY**

It will be our policy to provide equal employment opportunity to all qualified individuals without regard to race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It will also be our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

To make this policy effective, and to ensure conformance with the Rules and Regulations of the Federal Communications Commission, we have adopted an Equal Employment Opportunity Program which includes the following elements:

II. RESPONSIBILITY FOR IMPLEMENTATION

Name/Title

will be responsible for the administration and implementation of our Equal Employment Opportunity Program. It will also be the responsibility of all persons making employment decisions with respect to the recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III. POLICY DISSEMINATION

To ensure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts will be made:

- ☐ The station's employment application forms will contain a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, State or Federal agency if they believe they have been the victims of discrimination.
- ☐ Appropriate notices will be posted informing applicants and employees that the station is an Equal Opportunity Employer and of their right to notify an appropriate local, State or Federal agency if they believe they have been the victims of discrimination.
- ☐ We will seek the cooperation of unions, if represented at the station, to help implement our EEO program and all union contracts will contain a nondiscrimination clause.
- ☐ Other (specify)

IV. RECRUITMENT

To ensure that information concerning each full-time vacancy is widely disseminated, we propose to use the following list of recruitment sources consistent with the requirements of 47 C.F.R. Section 73.2080:

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 1 hour. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-0120), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0120.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.

Federal Communications Commission
Washington, D. C. 20554Approved by OMB
3060-0113**BROADCAST EQUAL EMPLOYMENT
OPPORTUNITY PROGRAM REPORT**

(To be filed with broadcast license renewal application)

(For FCC Use Only)

Code No.

Legal Name of the Licensee		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

TYPE OF BROADCAST STATION :

Commercial Broadcast Station

Noncommercial Broadcast Station

☐ Radio ☐ TV☐ Educational Radio

Low Power TV

☐ Educational TV

International

List call sign and location of all stations included on this report. List commonly owned stations that share one or more employees. Also list stations operated by the licensee pursuant to a time brokerage agreement. Indicate on the table below which stations are operated pursuant to a time brokerage agreement. To the extent that licensees include stations operated pursuant to a time brokerage agreement on this report, responses or information provided in Sections I through IV should take into consideration the licensee's EEO compliance efforts at brokered stations, as well as any other stations, included on this form. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)	Time Brokerage Agreement (check applicable box)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No

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October 2002

CONTACT PERSON IF OTHER THAN LICENSEE

Name			Street Address
City	State	Zip Code	Telephone No. ()

FILING INSTRUCTIONS

Broadcast station licensees are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, religion, and sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, a license renewal applicant whose station employment unit employs five or more full-time station employees must file a report of its activities to ensure equal employment opportunity. If a station employment unit employs fewer than five full-time employees, no equal employment opportunity program information need be filed. If a station employment unit is filing a combined report, a copy of the report must be filed with each station's renewal application.

A copy of this report must be kept in the station's public file. These actions are required to obtain license renewal. Failure to meet these requirements may result in sanctions or license renewal being delayed or denied. These requirements are contained in 47 C.F.R. Section 73.2080 and are authorized by the Communications Act of 1934, as amended.

DISCRIMINATION COMPLAINTS. Have any pending or resolved complaints been filed during this license term before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station(s)?

☐ Yes ☐ No

If so, provide a brief description of the complaint(s), including the persons involved, the date of the filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

--

Does your station employment unit employ fewer than five full-time employees?
Consider as "full-time" employees all those permanently working 30 or more hours a week.

☐ Yes ☐ No

If your station employment unit employs fewer than five full-time employees, complete the certification below, return the form to the FCC, and place a copy in your station(s) public file. You do not have to complete the rest of this form. If your station employment unit employs five or more full-time employees, you must complete all of this form and follow all instructions.

CERTIFICATION

This report must be certified, as follows:

- A. By licensee, if an individual;
- B. By a partner, if a partnership (general partner, if a limited partnership);
- C. By an officer, if a corporation or an association; or
- D. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT
(U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Name of Respondent
Title	Telephone No. (include area code)
Date	

The purpose of this document is to provide broadcast licensees, the FCC, and the public with information about whether the station is meeting equal employment opportunity requirements.

GENERAL POLICY

A broadcast station must provide equal employment opportunity to all qualified individuals without regard to their race, color, national origin, religion or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

RESPONSIBILITY FOR IMPLEMENTATION

A broadcast station must assign a particular official overall responsibility for equal employment opportunity at the station. That official's name and title are:

NAME	TITLE

It is also the responsibility of all persons at a broadcast station making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

I. EEO PUBLIC FILE REPORT

Attach as an exhibit one copy of each of the EEO public file reports from the previous two years. Stations are required to place annually such information as is required by 47 C.F.R. Section 73.2080 in their public files.

Exhibit No.

II. NARRATIVE STATEMENT

Provide a statement in an exhibit which demonstrates how the station achieved broad and inclusive outreach during the two-year period prior to filing this application. Stations that have experienced difficulties in their outreach efforts should explain.

Exhibit No.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 1 hour, 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PER, Paperwork Reduction Project (3060-0113), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0113.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.

NOTICE

SHOULD YOU NO LONGER OPERATE THIS EMPLOYMENT UNIT, PLEASE FURNISH THE CURRENT OPERATOR'S NAME, ADDRESS, DATE OF TRANSFER AND RETURN THE FORM 396-C IMMEDIATELY. CALL (202) 418-1450 TO OBTAIN FORMS FOR NEWLY ACQUIRED UNITS OR IF YOU HAVE ANY EEO QUESTIONS

RETURN THE COMPLETED FORM IN DUPLICATE INCLUDING ANSWERS TO THE SUPPLEMENTAL INVESTIGATION SHEET (SIS) IF APPLICABLE AS SOON AS POSSIBLE. FOR YOUR INFORMATION, THE UPPER RIGHT HAND CORNER OF THE FORM 396-C WILL BE MARKED WITH AN "X" FOR THOSE UNITS THAT MUST FILL OUT AN SIS. PURSUANT TO SECTION 76.1802 OF THE COMMISSION'S RULES, THE DUE DATE FOR FILING FORM 396-C IS SEPTEMBER 30TH OF EACH YEAR.

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB
3060-0095/0574

**INSTRUCTIONS FOR COMPLETING
FCC FORM 396-C**

**YOU ARE STRONGLY URGED TO CONSULT THE COMMISSION'S CABLE EEO RULES
BEFORE COMPLETING THIS FORM
47 C.F.R. Section 76.71 et seq.**

General Instructions

Supply the requested information for the unit. If the unit is to submit a Supplemental Investigation Sheet (SIS), one will be attached to the form and an "x" will appear in the brackets before "Supplemental Investigation Sheet Attached" located in the box "For FCC Use Only" on page 1 of the form. If the unit no longer exists due to consolidation with another unit, or is no longer under your control, attach as Exhibit A an explanation and proceed to Section V.

Section I

- A. In addition to the unit operator's legal name, supply, if applicable, the name of the MSO owning or controlling the operator.
- B. Supply the address to which you want the correspondence sent.
- C. Supply the county and state of the unit's principal employment office.
- D. A full-time employee is one who permanently works 30 or more hours per week.
- E. Insert the payroll period in July, August or September used for this year's report.
- F. Place an X in the appropriate brackets for each possible exhibit.

Section II

Submit as Exhibit A, a list of communities added or deleted from the unit using the format provided. To obtain this information, review the prior year's form for the unit, noting the communities then comprising the unit, and comparing that list with the names of the communities now comprising the unit.
(NOT APPLICABLE TO MVPD UNITS)

Section III

Carefully answer each of the nine (9) questions by checking either Yes or No. If the answer is No, attach as Exhibit B an explanation. The focus of question three is on whether cable units have engaged in broad and inclusive outreach. The Commission does not require the targeting of certain kinds of sources or organizations. With regard to question five, we clarify that efforts to seek out entrepreneurs should be broad enough to cover all segments of the community, and that no entity should be excluded on the basis of race, color, religion, national origin, age or gender. See 47 C.F.R. Section 76.75.

FCC FORM 396-C Instructions
October 2002

Section IV

You may attach as Exhibit C any additional information you believe useful in the FCC's evaluation of your EEO efforts. There is no requirement to provide such information.

Section V

Sign and date the form in the spaces provided. Also, print the name of the official signing as well as the title of that person. Return the original and one copy to the Commission by September 30th. Retain a copy for your files.

Supplemental Investigation Sheet (SIS)

If required, attach as Exhibits D, E, and F the job descriptions requested in Part I, the responses to the questions checked in Part II, and the EEO public file report requested in Part III.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPER REDUCTION ACT

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state, or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested in this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will vary from 10 minutes to 1 hour, 15 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERF, Paperwork Reduction Project (3060-0095/0574), Washington D.C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember – you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0095/0574.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1980, P.L. 95-511, DECEMBER 11, 1980, 44 U.S.C. 3507.

FCC FORM 396-C

Submit the original and one copy by September 30:

Federal Communications Commission
Policy Division, Media Bureau
Washington, D. C. 20554

Approved by OMB
3060-0095

SECTION I IDENTIFYING INFORMATION

A. Name of Operator:		
MSO Name:		
B. Employment Unit's Mailing Address		
City	State	Zip Code
C. County and State in which unit's employment office is located		

- D. Category of Respondent (check applicable box)
- ☐ Fewer than six (6) full-time employees during the selected payroll period. Complete Sections I, II and VIII
- ☐ Six (6) or more full-time employees during the selected payroll period. Complete ALL sections of the Form 395-A and the Supplemental Investigation Sheet, if attached

SECTION II COMMUNITY INFORMATION

System Communities Comprising Local Employment Unit			
Ident No.	Name of Community	Location (State)	Type

Review the list of communities served on the previous year's submission and attach as Exhibit A any additions or deletions using the format noted above. NOTE: APPLICABLE ONLY TO CABLE OPERATORS AND NOT TO OTHER MVPD UNITS.

Exhibit No. A

For FCC Use Only
Emp. Unit ID # _____
<input type="checkbox"/> Supplemental Investigation Sheet (SIS) Attached

E. Pay Period Covered by this Report (inclusive dates)
--

F. Attachments: (Check applicable boxes)			
Not Applicable	Attached	Exhibit - For:	
<input type="checkbox"/>	<input type="checkbox"/>	A-Section II	
<input type="checkbox"/>	<input type="checkbox"/>	B-Section III	
<input type="checkbox"/>	<input type="checkbox"/>	C-Section IV	
<input type="checkbox"/>	<input type="checkbox"/>	D-SIS-Job Descriptions	
<input type="checkbox"/>	<input type="checkbox"/>	E-SIS Narrative Responses	
<input type="checkbox"/>	<input type="checkbox"/>	F-SIS EEO Public File Report	

CHECK YES OR NO TO EACH OF THE FOLLOWING QUESTIONS. IF ANSWER TO ANY QUESTION BELOW IS NO, ATTACH AS EXHIBIT B AN EXPLANATION

B

YES NO

1. Have you complied with the outreach provisions of the FCC's MPVD Equal Employment Opportunity Rule, 47 C.F.R. Section 76.75(b) during the twelve month period prior to filing this form?
2. Do you disseminate widely your EEO Program to job applicants, employees, and those with whom you regularly do business?
3. Do you contact organizations, media, educational institutions, and other potential sources of applicants for referrals whenever job vacancies are available in your organization?
4. Do you undertake to offer promotions to positions of greater responsibility in a nondiscriminatory manner?
5. To the extent possible, do you seek out entrepreneurs in a nondiscriminatory manner and encourage them to conduct business with all parts of your organization?
6. Do you analyze the results of your efforts to recruit, hire, promote, and use services in a nondiscriminatory manner and use these results to evaluate and improve your EEO program?
7. Do you define the responsibility of each level of management to ensure a positive application and vigorous enforcement of your policy of equal employment opportunity and maintain a procedure to review and control managerial and supervisory performance?
8. Do you conduct a continuing program to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, age, or sex from your personnel policies and practices and working conditions?
9. Do you conduct a continuing review of job structure and employment practices and maintain positive recruitment training, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility?

SECTION IV

ADDITIONAL INFORMATION

You may provide as Exhibit C any additional information that you believe might be useful in evaluating your efforts to comply with the Commission's EEO provisions. There is no requirement to provide additional data or information.

Exhibit No.
C

Exhibit No.

This report must be certified as follows:

- A. By the individual owning the reporting system if individually owned;
- B. By a partner, if a partnership; or
- C. By an officer, if a corporation or association.

I certify that to the best of my knowledge, information and belief, all statements contained in this report are true and correct

Signed		Title
Date		Name of Respondent
Telephone No. (include area code)		

9.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE (U.S. CODE, TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

SECTION VIII CERTIFICATION

Give brief job descriptions for employees in the job categories specified below. The number specified in the box indicates the number of different job descriptions that are to be submitted for each category. Job descriptions should include the position title and a brief description of the major duties and responsibilities of the individual(s) in the position.

- | | | | | | |
|-------------------------|------------------------|-------------------------|-------------------------|-------------------------|---------------------------|
| 1. <input type="text"/> | Officials and Managers | 4. <input type="text"/> | Sales Workers | 7. <input type="text"/> | Operatives (semi-skilled) |
| 2. <input type="text"/> | Professionals | 5. <input type="text"/> | Office and Clerical | 8. <input type="text"/> | Laborers (unskilled) |
| 3. <input type="text"/> | Technicians | 6. <input type="text"/> | Craft Workers (skilled) | 9. <input type="text"/> | Service Workers |

Part II Inquiries Concerning EEO Program and Practices

Submit responses to the inquiries indicated by an "X." Responses should be brief, but must provide sufficient information to describe the employment unit's activity and efforts in the area of inquiry.

1. ☐ Describe the employment unit's efforts to comply with the outreach provisions of 47 C.F.R. Section 76.75(b) or (f).
2. ☐ Describe the employment unit's efforts to disseminate widely its equal employment opportunity program to job applicants, employees, and those with whom it regularly does business.
3. ☐ Name the organizations, media, educational institutions, and other recruitment sources used to attract applicants whenever job vacancies become available.
4. ☐ Explain the employment unit's efforts to promote in a nondiscriminatory manner to positions of greater responsibility.
5. ☐ Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.
6. ☐ Report the findings of the employment unit's analysis of its efforts to recruit, hire and promote in a nondiscriminatory manner and explain any difficulties encountered in implementing its EEO program.
7. ☐ Describe the responsibility of each level of the employment unit's management with respect to application and enforcement of its EEO policy and explain the procedure for review and control of managerial and supervisory performance.
8. ☐ Describe the manner in which the employment unit conducts its continuing review of job structure and employment practices.
9. ☐ Other Inquiries:

Part III EEO Public File Report

Attach a copy of the EEO public file report from the previous year. Cable entities are required to place annually such information as is required by 47 C.F.R. Section 76.1702 in their public files.

EMP UNIT ID:

MSO NAME:

OPR NAME:

Federal Communications Commission
Washington, D. C. 20554

DRAFT
NOT Approved by OMB
3060-0922

BROADCAST MID-TERM REPORT

(For FCC Use Only)

Code No.

Legal Name of the Licensee		
Mailing Address		
City	State or Country (if foreign address)	ZIP Code
Telephone Number (include area code)	E-Mail Address (if available)	
	Facility ID Number	Call Sign

TYPE OF BROADCAST STATION :

Commercial Broadcast Station

Noncommercial Broadcast Station

☐ Radio ☐ TV☐ Educational Radio

Low Power TV

☐ Educational TV

International

List call sign and location of all stations included on this statement. List commonly owned stations that share one or more employees. Also list stations operated by the licensee pursuant to a time brokerage agreement. Indicate on the table below which stations are operated pursuant to a time brokerage agreement. To the extent that licensees include stations operated pursuant to a time brokerage agreement on this report, responses or information provided in Sections I through III should take into consideration the licensee's EEO compliance efforts at brokered stations, as well as any other stations, included on this form. For purposes of this form, a station employment unit is a station or a group of commonly owned stations in the same market that share at least one employee.

Call Sign	Facility ID Number	Type (check applicable box)	Location (city, state)	Time Brokerage Agreement (check applicable box)
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No
		<input type="checkbox"/> AM <input type="checkbox"/> FM <input type="checkbox"/> TV		<input type="checkbox"/> Yes <input type="checkbox"/> No

FCC 397
September 2002

SEND NOTICES AND COMMUNICATIONS TO THE FOLLOWING NAMED PERSON AT THE ADDRESS INDICATED BELOW:

Name			Street Address
City	State	Zip Code	Telephone No. ()

FILING INSTRUCTIONS

Broadcast station licensees are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, national origin, religion, and sex. See 47 C.F.R. Section 73.2080. Pursuant to these requirements, a television station employment unit that employs five or more full-time station employees must file a full and complete Broadcast Mid-Term Report. If a television station employment unit employs fewer than five full-time employees, only the first two pages of this report need be filed.

A copy of this Mid-Term Report must be kept in the station's public file. Failure to meet these requirements may result in sanctions or remedies. These requirements are contained in 47 C.F.R. Section 73.2080 and are authorized by the Communications Act of 1934, as amended.

Does your station employment unit employ fewer than ten full-time employees if television or fewer than eleven full-time employees if radio?

☐ Yes ☐ No

If yes, you do not have to file this form with the FCC. However, you have the option to complete the certification below, return the form to the FCC, and place a copy in your station(s) public file. You do not have to complete the rest of this form. If your station employment unit employs five or more full-time employees, if television, or eleven or more full-time employees if radio, you must complete all of this form and follow all instructions.

CERTIFICATION

This report must be certified, as follows:

- A. By licensee, if an individual;
- B. By a partner, if a partnership (general partner, if a limited partnership);
- C. By an officer, if a corporation or an association; or
- D. By an attorney of the licensee, in case of physical disability or absence from the United States of the licensee.

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT
(U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT
(U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

certify to the best of my knowledge, information and belief, all statements contained in this report are true and correct.

Signed	Name of Respondent
Title	Telephone No. (include area code)
Date	

GENERAL POLICY

A broadcast station must provide equal employment opportunity to all qualified individuals without regard to their race, color, national origin, religion or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

RESPONSIBILITY FOR IMPLEMENTATION

A broadcast station must assign a particular official overall responsibility for equal employment opportunity at the station. That official's name and title are:

NAME	TITLE

It is also the responsibility of all persons at a broadcast station making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that no person is discriminated against in employment because of race, color, religion, national origin or sex.

MID-TERM REPORT

Television station employment units with five or more full-time employees and radio station employment units with more than ten full-time employees filing in the middle of the license term must attach a copy of each of the EEO public file reports from the previous two years. Stations are required to place annually such information as is required by 47 C.F.R. Section 73.2080 in their public files.

☐**FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT**

The FCC is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this report. We will use the information you provide to determine if the benefit requested is consistent with the public interest. If we believe there may be a violation or potential violation of a FCC statute, regulation, rule or order, your request may be referred to the Federal, state or local agency responsible for investigating, prosecuting, enforcing or implementing the statute, rule, regulation or order. In certain cases, the information in your request may be disclosed to the Department of Justice or a court or adjudicative body when (a) the FCC; or (b) any employee of the FCC; or (c) the United States Government, is a party to a proceeding before the body or has an interest in the proceeding. In addition, all information provided in this form will be available for public inspection. If you owe a past due debt to the federal government, any information you provide may also be disclosed to the Department of Treasury Financial Management Service, other federal agencies and/or your employer to offset your salary, IRS tax refund or other payments to collect that debt. The FCC may also provide this information to these agencies through the matching of computer records when authorized. If you do not provide the information requested on this report, the report may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Your response is required to obtain the requested authority. We have estimated that each response to this collection of information will average 30 minutes. Our estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Paperwork Reduction Project (3060-0922), Washington, D. C. 20554. We will also accept your comments via the Internet if you send them to jboley@fcc.gov. Remember - you are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060-0922.

THE FOREGOING NOTICE IS REQUIRED BY THE PRIVACY ACT OF 1974, P.L. 93-579, DECEMBER 31, 1974, 5 U.S.C. 552a(e)(3), AND THE PAPERWORK REDUCTION ACT OF 1995, P.L. 104-13, OCTOBER 1, 1995, 44 U.S.C. 3507.

APPENDIX E

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (“RFA”),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on small entities by the policies and rules proposed in this *Second Report and Order and Third Notice of Proposed Rule Making* (“*Third Notice*”). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Notice* provided above. The Commission will send a copy of the *Third Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the *Third Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rule Changes:

This *Third Notice* requests comments concerning the applicability of new equal employment opportunity (“EEO”) rules and policies with respect to part-time employees of broadcast and multichannel video programming distributors (“MVPDs”). The EEO rules apply to full-time employees, defined as those whose regular work schedule is 30 hours or more a week. The current record is insufficient to allow the Commission to determine whether and how to apply the rules to part-time positions, defined as fewer than 30 hours per week. Accordingly, the *Third Notice* seeks comment on this issue. In particular, the *Third Notice* seeks comment on how many and what types of positions in the broadcast and MVPD industries fall into this category; the significance of these positions in terms of entry into broadcasting; how burdensome compliance with the recruitment, record-keeping, and reporting requirements for all or some part-time positions would be for broadcasters and MVPDs; and whether the requirements applicable to part-time positions should be the same as or different from those applicable to full-time positions. We also seek comment on whether we should set a minimum number of hours for a part-time position to be covered by the rules and, if so, what that minimum should be.

B. Legal Basis:

Authority for the actions proposed in this *Third Notice* may be found in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

C. Recording, Recordkeeping, and Other Compliance Requirements:

As noted, the purpose of this rulemaking is to determine whether and how to apply the Commission’s EEO rules to employment positions involving fewer than 30 hours per week. Hence, this *Third Notice* anticipates that any recording, recordkeeping and compliance requirements proposed for part-time employees will not exceed those already provided for full-time employees.⁴

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (“CWAAA”). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).

² See 5 U.S.C. § 603.

³ See *id.*

⁴ See discussion in *FRFA*, *supra*, at Appendix B, Section C.

D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:**1. Definition of a "Small Business"**

The proposed rules would apply to broadcast stations and MVPDs. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.⁵ Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.⁶ The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the [SBA] and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."⁷

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁹ Finally, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁰ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹¹ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹² The United States Bureau of the Census (Census Bureau) estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities.

2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or

⁵ 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 601(3).

⁸ 5 U.S.C. § 601(4).

⁹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹⁰ 5 U.S.C. § 601(5).

¹¹ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹² *Id.*

television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms.¹³ The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.¹⁴ The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.¹⁵ Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The proposed rules will apply to broadcast television and radio stations.¹⁶ The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business.¹⁷ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.¹⁸ Included in this industry are

¹³ 13 C.F.R. § 121.104(d)(1).

¹⁴ 13 C.F.R. § 121.103(a)(1).

¹⁵ 13 C.F.R. § 121.103(a)(2).

¹⁶ While we believe that the SBA's definition of "small business" in this context greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the rules on small television and radio stations, for purposes of this IRFA, we include the SBA's definition in determining the number of small businesses to which the rules would apply.

¹⁷ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513120.

¹⁸ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

commercial, religious, educational, and other television stations.¹⁹ Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.²⁰ Separate establishments primarily engaged in producing taped television program materials are classified under other North American Industry Classification (NAICS) numbers.²¹

There were 1,695 full-service television stations operating in the as of December 2001.²² According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.²³ Of this total, 734 firms had annual receipts of \$9,999,999.00 or less and an additional 71 had receipts of \$10 million to \$24,999,999.00.²⁴ Thus, under this standard, the majority of firms can be considered small.

The SBA defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.²⁵ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.²⁶ Included in this industry are commercial, religious, educational, and other radio stations.²⁷ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.²⁸ However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another NAICS number.²⁹ According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.³⁰ Of this total 4,265 had annual receipts of \$4,999,999.00 or less,

¹⁹ *Id.*; see Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, at NAICS code 513120.

²⁰ 1992 Census, Series UC92-S-1, at Appendix A-9.

²¹ *Id.*; formerly SIC code 7812 (Motion Picture and Video Tape Production) (NAICS code 512110); formerly SIC code 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs) (NAICS codes 512110, 512191, 512290).

²² FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002).

²³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513120 (issued Oct. 2000).

²⁴ *Id.* The census data do not provide a more precise estimate.

²⁵ 13 C.F.R. § 121.201, NAICS codes 513111 and 513112.

²⁶ 1992 Census, Series UC92-S-1, at Appendix A-9.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513220 (issued Oct. 2000).

and an additional 103 firms had receipts of \$5 million to \$9,999,999.00.³¹ Thus, under this standard, the great majority of firms can be considered small.

The proposed rules would also apply to MVPDs. SBA has developed a definition of a small entity for cable and other program distribution, which includes all such companies generating \$12.5 million or less in annual receipts.³² This definition includes direct broadcast satellite services (DBS), multipoint distribution systems (MDS), and local multipoint distribution service (LMDS). According to Census Bureau data for 1997, there were 1,311 firms within the industry category Cable and Other Program Distribution, total, that operated for the entire year.³³ Of this total, 1,180 firms had annual receipts of \$9,999,999.00 or less, and an additional 52 firms had receipts of \$10 million to \$24,999,999.00.³⁴ Thus, under this standard, the majority of firms can be considered small. Below we discuss these services to provide a more succinct estimate of small entities.

Cable Systems: The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.³⁵ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.³⁶ Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate less than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds \$250,000,000."³⁷ The Commission has determined that there are 67,700,000 subscribers in the United States.³⁸ Therefore, we found that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.³⁹ Based on available data, we find that the number of

³¹ *Id.* The census data do not provide a more precise estimate.

³² 13 C.F.R. § 121.201 (NAICS codes 513210 and 513220).

³³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513220 (issued Oct. 2000).

³⁴ *Id.* The census data do not provide a more precise estimate.

³⁵ 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995).

³⁶ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

³⁷ 47 U.S.C. § 543(m)(2).

³⁸ FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (January 24, 2001).

³⁹ 47 C.F.R. § 76.1403(b) (SIC 4833).

cable operators serving 677,000 subscribers or less totals approximately 1,450.⁴⁰ Since we do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

MDS: MDS involves a variety of transmitters, which are used to relay programming to the home or office.⁴¹ The Commission has defined "small entity" for purposes of the 1996 auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.⁴² This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁴³ These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.⁴⁴ Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.⁴⁵ The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business.

LMDS: The auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁴⁶ An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴⁷ These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.⁴⁸ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission reaucted 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction

⁴⁰ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁴¹ For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

⁴² 47 C.F.R. § 1.2110(a)(1).

⁴³ *See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

⁴⁴ 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$11 million or less). *See* 13 C.F.R. § 121.201.

⁴⁵ *Id.* A BTA is the geographic area by which the MDS is licensed. *See* Rand McNally, 1992 *Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

⁴⁶ *See Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997).

⁴⁷ *Id.*

⁴⁸ *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (January 6, 1998).

and the 40 winning bidders in the reauction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

DBS: Because DBS provides subscription services, it falls within the SBA-recognized definition of "Cable and Other Program Distribution."⁴⁹ This definition provides that a small entity is one with \$12.5 million or less in annual receipts.⁵⁰ Currently, there are nine DBS authorizations, though there are only two DBS companies in operation at this time. We neither request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would be considered a small business under the SBA definition.

An alternative way to classify small entities is by the number of employees. Based on available data, we estimate that in 1997 the total number of full-service broadcast stations with four or fewer employees was 5186, of which 340 were television stations.⁵¹ Similarly, we estimate that in 1997, 1900 cable employment units employed fewer than six full-time employees. Also, in 1997, 296 "MVPD" employment units employed fewer than six full-time employees.⁵² We also estimate that in 1997, the total number of full-service broadcast stations with five to ten employees was 2145, of which 200 were television stations. Similarly, we estimate that in 1997, 322 cable employment units employed six to ten full-time employees. Also, in 1997, approximately 65 MVPD employment units employed six to ten full-time employees.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵³

This *Third Notice* seeks comments on the applicability of the EEO rules to part-time employees, and would not change the status of small broadcasters or MVPDs.

We note that the issue at hand affects the compliance burdens of entities that, by definition, are not within our EEO small business size standards. We have nonetheless created this present initial analysis to encourage comments by small entities and create a fuller record.

Currently, broadcasters with station employment units of five to ten full-time employees are provided some relief from EEO program requirements, and station employment units of fewer than five full-time employees are not required to demonstrate compliance with the EEO program requirements. In addition,

⁴⁹ 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

⁵⁰ *Id.*

⁵¹ We base these estimates on a compilation performed by the Equal Employment Opportunity staff, Policy Division, Media Bureau, FCC.

⁵² At that time, we considered "MVPDs" to be all multichannel video programming distributors that were not cable operators.

⁵³ 5 U.S.C. § 603(c).

MVPD employment units employing six to ten full-time employees are provided some relief from the EEO program requirements, and MVPD employment units with fewer than six full-time employees are not required to demonstrate compliance with the EEO program requirements.

F. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:

We note that certain commenters have indicated that federal, state and local EEO requirements serve much the same purpose as our EEO Rule. We have addressed these arguments, *supra*, in para. 130.⁵⁴

⁵⁴ See also *Report and Order*, 15 FCC Rcd 2329, 2360-61 (2000), *recon. denied*, 15 FCC Rcd 22548 (2000).

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (MM Docket No. 98-204).

I am proud that the Commission has unanimously adopted new EEO rules. When we issued the notice of proposed rulemaking last December, we sought ways to revise the equal opportunity rules to be consistent with the holding of the D.C. Circuit in *Association*¹. We do so here today by establishing effective and legally sustainable rules.

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. Thus, it is only right and proper for this agency to expect its licensees to afford equal opportunities for everyone. Indeed, I believe it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by those licenses. If the public interest benefit means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived. Thus, we will remain vigilant in our enforcement of these rules.

The rules we adopt today include a broad outreach program that is squarely race and gender neutral and, thus, not constitutionally suspect. The EEO rules focus on increasing the possibility that more minorities and women get the opportunity to compete fairly for employment. No one is entitled to rewards they did not earn. No one is entitled to jobs for which they are not qualified. But, *everyone* is entitled to an equal opportunity to vie for those rewards and compete for those jobs. The outreach program provides for the simple opportunity to compete for employment vacancies. All Americans, regardless of stripe, benefit when our workforce captures the rich talent of our great nation.

¹ *MD/DC/DE Broadcasters Association v FCC*, 236 F.3d 13, reh'g den. 253 F. 3d 732 (D.C. Cir. 2001) pet for cert. Filed, *MMTC v MD/DC/DE Broadcasters Association*. No. 01-639 (October 17, 2001).

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (adopted November 7, 2002)

Today the Commission is adopting equal employment opportunity rules that are meaningful and effective and, just as important, will withstand judicial scrutiny. As I have stated previously, the Commission must respect the courts and craft an order consistent with the decisions set forth in *MD/DC/DE Broadcasters Association v. FCC* and *Lutheran Church-Missouri Synod v. FCC*. It would be irresponsible to place in jeopardy rules that can have a significant impact on the media opportunities available to all members of our communities by going down a road that is neither appropriate nor effective.

I appreciate all the valuable input that we have received from commenters in this proceeding and the rules we have adopted are responsive to their concerns. Broad outreach and anti-discrimination rules will enable all people from various backgrounds within each community to become aware of specific job openings and media opportunities in general. In addition, the longer-term recruitment initiatives, including scholarships and internship programs, will help a wide array of people develop the knowledge and skills to pursue media employment opportunities. Media companies will benefit from an expanded range of qualified applicants from which to choose and candidates will have a fair opportunity to compete for jobs. In the end, the public benefits from services created and delivered by a talented workforce. The rules we adopt today do not provide better opportunities for any particular group, but ensure equal opportunities for all.

**SEPARATE STATEMENT
OF COMMISSIONER KEVIN J. MARTIN**

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order, MM Docket Nos. 98-204 (Nov. 7, 2002).

I am pleased to support this Order adopting Equal Employment Opportunity rules. Our goal has been to design an outreach program that is comprehensive, effective, and constitutional. I believe we have succeeded.

The program we have established ensures that broadcasters and multi-channel video programming distributors (MVPDs) will engage in expansive recruitment efforts, which will facilitate the ability of all members of society to learn about openings in the media sector. By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition. And – critically – it will do so in manner that will withstand court scrutiny.

I note that this Order does not reinstate the requirement that licensees submit annual reports on the race and gender make-up of their workforce. As we stated in the NPRM, collection of this information could be useful for analysis of industry trends, but it is not a part of our EEO program requirement and is in fact required pursuant to a separate provisions of our rules.¹ We therefore will address the collection of this information in a future proceeding.

¹ See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Notice of Proposed Rulemaking, 16 FCC Rcd 22843, 22858, ¶50 (2001).

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

*In the Matter of Review of the Commission's Broadcast and Cable
Equal Employment Opportunity Rules and Policies
MM Docket No. 98-204*

When we approved the Second Notice of Proposed Rulemaking that formed the basis for the item we adopt today, I stated both my hope that the NPRM would result in strong EEO rules that I would be able to support, and my concern that the NPRM as written did not reflect the deep and passionate commitment to a diverse workplace that America must have if it is to fulfill its potential. I thank my colleagues for their willingness to work together since then. Each of us comes at this issue with somewhat different perspectives and premises. Each of us would likely have written the item differently if we were assigned authorship. Nevertheless, we engaged in dialogue so that we could reach some compromises that would not only create rules that would withstand court scrutiny but also -- and for me most importantly -- move us toward some credible equal opportunity initiatives. I commend Chairman Powell for his commitment to put in place rules for what I am convinced is one of the most important issues confronting the Commission.

To me, EEO rules are indeed an essential part of the obligation to serve the public interest. This is not an area in which we can afford to be timid, because there is nothing less than civil rights at stake. Diversity of viewpoint, ownership, and employment in media have long been and continue to be fundamental public policy goals. In my view, how we craft these rules is also related -- closely, intimately connected -- to the public interest that both the FCC and broadcasters are charged to promote. This is not something we do at the fringes, or something

divorced from our other ongoing work; it is, rather, at the heart of what we do, and how we do here will affect how we do across the board.

We are taking some first positive steps on equal employment opportunity today. We require broadcasters and MVPDs to conduct broad outreach for all full-time job openings, to provide information on full-time job openings to community groups who request such information, and to participate in a number of longer-term recruitment initiatives. In addition, we have incorporated some of the input we received, both from commenters and from those who joined us for the *en banc* hearing back in June, to help make our original proposals stronger. For example, as suggested by the Minority Media & Telecommunications Council, stations and MVPDs that participate in job fairs under the menu of broad recruitment options in the rules must send personnel who have substantial responsibility for hiring decisions to those fairs. Further, as Charles Warfield of Inner City Broadcasting suggested at the *en banc*, we are encouraging the use of EEO training for industry management personnel by adding it to that menu of options. I am pleased that we will be looking more carefully at the application of the rules to part-time employees through a further notice. I am particularly pleased that we have emphasized in this order our commitment to examine and act upon licensees' compliance with our EEO rules at license renewal time. I, for one -- and I think I am not alone -- would be more than amenable to imposing strong and serious sanctions -- *very* strong and *very* serious, up to and including revocation of licenses -- for demonstrated lack of compliance.

As I stated when we released the Second NPRM, I understand that the decisions of the D.C. Circuit severely limited the scope of EEO rules the Commission could adopt. I was

concerned that we not react timidly to a court decision that I personally thought was timid to begin with. Then as now, I am saddened by any retreat in the area of equal employment opportunity and, indeed, in civil rights generally. Nevertheless that decision was out there, daunting and discouraging of the kind of proactivity that many of us would like to see.

Most of us understand that we are nowhere near the objective of equal opportunity in communications today – not that we’ve reached that happy summit in too many other areas of our national life, either. Just two years ago, a FCC-commissioned study by the Ivy Group documented what many of us already knew: that minorities and women have faced pervasive discrimination in the media industry since its beginnings. The report concluded that government actions or inaction on particular regulatory and market issues -- including “uneven enforcement” of EEO policy -- have exacerbated the barriers.

I’ve heard the bad news personally in my conversations with many minority and women’s groups. African American broadcasters tell me that, even though some of them have done pretty well in this industry, they didn’t think they could repeat that success the way things are going. Here, not so incidentally, is a hugely important area that we need to look at intensively as we study the effects of media concentration. The effects of consolidation are not just economic; they are many-pronged and surely have critically important equal opportunity and diversity implications. We have a long way to go to open wide the doors of equal opportunity, and to keep them open, in our communications industries.

I also welcome the fact that today the Commission commits to helping spread the word

about the importance we attach to these rules. I hope we will take full advantage of this commitment, getting out around the country to emphasize the importance of equal opportunity and proactively assisting the industry toward full compliance. I hope we will follow through on this zealously, and I, for one, will be a willing and enthused participant.

Lastly, I cannot over-emphasize the important role that must still be fulfilled by all the individuals and organizations who assisted us in developing and crafting these rules. We owe you a deep debt of gratitude for all the hard work and dedication that went into this process. But as you know better than me, equal opportunity work is never done. So you need to help us – no, you need to lead us – into making this program live and breathe and work. I'll give you just one example. There was apprehension that, under the circumscriptions of the court, we could not require broadcasters to send job announcement notices to minority recruiters. That would be somehow too aggressive and intrusive. But I don't believe there is anything constraining any individual or organization from reaching out and urging any particular recruitment agency to request such notices from broadcasters. And we say in the item that said recruiter only has to ask once and it will be permanently on the list to receive such notices. It might not be the easiest or most ideal way to go; but it just may be workable and effective until we can do better. So I hope we will look creatively and imaginatively and actively at the rules being approved today. The point is that there is nothing that prevents a broadcaster, cable operator, or any other MVPD from taking action beyond what we require today.

While I've been in this town long enough to never be surprised, I would surely be immensely disappointed if anyone challenged this modest proposal. That energy could be better

utilized in making the rules we approve today work. Going forward, I would hope that, once these rules are fully implemented, the Commission would consider pushing its equal opportunity program further.

I hope that today's proceeding will join all stakeholders in a spirit of working together to open the doors of equal opportunity. America is a land of diversity. We will succeed not by regretting that diversity, but by celebrating it. I hope all of us -- Commission, industry, trade associations, labor, and advocates all -- will celebrate our diversity by making these rules work. And when in the course of America's progress we are one day afforded the opportunity to be even more active, I hope we will seize that day, too.

